(11)

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Title: Michael Yarborough, Warden, Petitioner
v.
Michael Alvarado
Docketed: May 16, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-56770)
Decision Date: December 18, 2002
Rehearing Denied: February 11, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 12 2003	Petition for writ of certiorari filed. (Response due June 16, 2003)
Jun 16 2003	Brief of respondent Michael Alvarado in opposition filed.
Jul 2 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 30 2003	Petition GRANTED.
Oct 31 2003	Motion for appointment of counsel filed by respondent.
Nov 5 2003	Motion DISTRIBUTED for Conference of November 26, 2003.
Nov 13 2003	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Nov 14 2003	Brief amicus curiae of United States filed.
Nov 14 2003	Joint appendix filed.
Nov 14 2003	Brief of petitioner Michael Yarborough, Warden filed.
Dec 1 2003	Motion to appoint counsel filed by respondent GRANTED. Tara K. Allen, Esquire, of Malibu, California is appointed to serve as counsel for the respondent in this case.
Dec 10 2003	SET FOR ARGUMENT Monday March 1, 2004.
Dec 15 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 17 2003	CIRCULATED.
Dec 18 2003	Brief of respondent Michael Alvarado filed.
Dec 19 2003	Brief amici curiae of Juvenile Law Center, et al. filed. (Distributed)
Dec 19 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 8 2004	Record received from the U.S.C.A. for the 9th Circuit and U.S.D.C. for the Central District of California. (1 envelope)
Jan 22 2004	Reply of petitioner Michael Yarborough, Warden filed. (Distributed)
Jan 26 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 18 2004	Supplemental brief of respondent Michael Alvarado filed. (Distributed)
Mar 1 2004	Argued. For petitioner: Deborah J. Chuang, Deputy Attorney General, Los Angeles, Cal.; and for the United States, as amicus curiae, John P. Elwood, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Tara K. Allen, Malibu, Cal. (Appointed by this Court.)

(1)

Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has held that the test to determine if a person is "in custody" to require warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), is an objective test (i.e., whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest). *Thompson v. Keohane,* 516 U.S. 99, 112 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). The question presented is:

Whether, in applying the objective test for a "custody" determination under *Miranda*, a court must consider the age and experience of a person if he or she is a juvenile.

2. Under 28 U.S.C. § 2254(d), a federal court may not grant habeas corpus relief to a state prisoner on a claim adjudicated on its merits in State court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." In *Williams v. Taylor*, 529 U.S. 362, 408 (2000), this Court explicitly left open how "extension of legal principle" cases should be treated under § 2254(d)(1). The question presented is:

Whether a state court adjudication can be deemed an "objectively unreasonable" application of clearly established Supreme Court precedent, for purposes of § 2254(d), because it declines to "extend" the rule of a Supreme Court precedent to a new context.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Michael Yarborough, Warden of California State Prison—Los Angeles County, at Lancaster, California (hereafter the Warden), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals is reported as *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), *amended* (2003), and is reproduced in pages A1 to A30 of the Appendix (App.) to this petition. The order of the District Court denying habeas corpus relief is unreported. App. B1-B10. The opinion of the California Court of Appeal is certified for partial publication and reported as *People v. Soto*, 74 Cal. App. 4th 1099, 88 Cal. Rptr. 2d 688 (1999). App. C1-C26.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals granting habeas corpus relief was amended and entered on February 11, 2003. The Court of Appeals denied the Warden's petition for rehearing with suggestion for rehearing en banc on February 11, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

After midnight on September 22, 1995, respondent Michael Alvarado, Paul Soto, and others went to a shopping mall in Santa Fe Springs, California. They saw a truck driven by Francisco Castaneda. One person in the group approached Mr. Castaneda and obtained one dollar from him. In Alvarado's

presence, Soto said, "Let's jack," meaning to steal the truck. Soto and Alvarado approached Mr. Castaneda's truck. Soto walked to the driver's side of the truck, while Alvarado walked towards the passenger door of the truck. A gunshot and a scream followed. Mr. Castaneda was found dead from a bullet wound.

Approximately one month after the crimes, Los Angeles County Sheriff's Detective Cheryl Comstock left word at Alvarado's house and with his mother at her workplace that the Sheriff's Department needed to speak with Alvarado. Alvarado's mother told Detective Comstock that Alvarado's father would bring Alvarado to the Sheriff's station so he could be interviewed. Both parents went with Alvarado to the Sheriff's station and gave their permission for Detective Comstock to interview him. Alvarado was seventeen years old at the time of the interview. His parents were apparently refused permission to be present during the interview.

The interview, conducted exclusively by Detective Comstock, lasted approximately two hours, from 12:30 p.m. to 2:30 p.m. She never told Alvarado that he was under arrest and did not give him *Miranda* warnings. Near the end of the interview, Detective Comstock indicated that Alvarado would be allowed to return home after the interview.

Detective Comstock expressed disbelief when Alvarado's initial version of events omitted any mention of the crimes. Alvarado repeated his statement that he had seen no shooting. Detective Comstock informed Alvarado that she had witnesses who said "quite the opposite," and that she had "three notebooks full of notes." She urged him to tell the truth. She never told him that he would have to remain in the Sheriff's station until he told the truth.

Eventually, Alvarado gave further details of the crime, including his role in hiding the gun after the murder. He identified Soto as the shooter. Near the end of the interview, Alvarado was offered the use of a telephone to make a call, but he declined. Shortly thereafter, he was also offered an

opportunity to take a bathroom break or water break, which he also declined. He returned home after the interview.

In December 1995, Detective Comstock told Alvarado's parents that a warrant had been issued for Alvarado's arrest and Alvarado turned himself in at the Sheriff's station. He was charged with Mr. Castaneda's murder and attempted robbery.

Prior to trial, Alvarado moved to suppress evidence of his statements to Detective Comstock. The focus of his argument was the failure of the detective to interview him in the presence of his parents. The prosecution filed an opposition to the motion, arguing that *Miranda* advisements were not required because Alvarado was not in custody during the interview. Following a hearing on the motion, the trial court denied Alvarado's motion to suppress his statements. His statements during the interview were admitted into evidence at trial.

Alvarado was convicted of murder and attempted robbery and was sentenced to state prison for an indeterminate term of fifteen years to life. He appealed his convictions. The California Court of Appeal rejected his claim that his statements were erroneously admitted by the trial court in violation of *Miranda*. App. C11-C17. After setting forth the circumstances surrounding Alvarado's interview (App. C12-C17), the California Court of Appeal stated, "We are satisfied that a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave." App. C17. The court reasoned that Alvarado was not told he could not leave until he told the truth, and was not subjected to intense and aggressive tactics. The court noted that although Detective Comstock made it clear to Alvarado that she disbelieved his early, exculpatory, version of the events on the night of the murder, she did not fabricate evidence or subject him to intense pressure. The court concluded that Alvarado was not in custody during his interview with Detective Comstock, and therefore no *Miranda* warnings were required. App. C17. Alvarado's petition for review in the California Supreme Court was denied.

Alvarado filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Central District of California. The petition claimed as a ground for relief that his statements were obtained in violation of *Miranda*. The magistrate judge issued a report recommending that the petition be denied with prejudice. The magistrate judge found that Alvarado was not in custody and that his statements were properly admitted. The magistrate judge concluded that the California court's rejection of Alvarado's claim therefore was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. App. B1-B8. The District Court filed an order adopting the findings, conclusions, and recommendations of the magistrate judge, and entered a judgment denying the petition and dismissing it with prejudice. App. B9-B10.

Alvarado appealed. In a published decision, the Ninth Circuit held that a defendant's juvenile status alters the "in custody" determination for *Miranda* purposes. App. A1-A30. The Ninth Circuit stated that Supreme Court cases have held that a juvenile is more susceptible to police coercion during a custodial interrogation than would be a similarly-situated adult. App. A17-A18. The court reasoned that, because the age and circumstances of a juvenile defendant are relevant factors in determining whether a confession or a waiver of constitutional rights are voluntarily given, there was "no principled reason why similar safeguards . . . would not apply equally to an 'in custody' determination." App. A18-A19. The Ninth Circuit held that because the state court failed to address how Alvarado's juvenile status affected the "in custody" determination, the state court unreasonably failed to "extend" a clearly established legal principle to a new context. App. A22-A26. The court further held that, considering the additional factors of Alvarado's age, his lack of prior arrest history, his inexperience with law enforcement officers, the parental involvement to arrange for his interview with the Sheriff's Department, and the Sheriff's Department's refusal to let his parents attend the interview in the objective

determination of custodial status, Alvarado was "in custody." App. A20, A25-A26. The Ninth Circuit also held that the improper admission of the incriminating statements by the state court had a substantial and injurious effect on the subsequent jury verdict. The Court of Appeals reversed the District Court's denial of the habeas petition and remanded the case for the district court to issue a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state began trial proceedings within 120 days of the issuance of the mandate. App. A30.

The Warden's petition for rehearing with suggestion for rehearing en banc in the United States Court of Appeals for the Ninth Circuit was denied on February 11, 2003. App. A1, A5.

On February 12, 2003, the Warden filed a motion to stay the issuance of the mandate in the Ninth Circuit. The Ninth Circuit has not yet ruled upon the motion, and the mandate has not issued.

REASONS FOR GRANTING THE WRIT

In this case, the Ninth Circuit made the controversial judgment that a particular person's age and "juvenile status," factors logically relevant in determining whether an accused's will had been overborne by coercion, are somehow also vital considerations in objectively determining whether alleged restraints upon the person's freedom of movement approximate that of a full-blown arrest. In doing so, the Ninth Circuit recognized that it was extending a rule from this Court's "voluntariness" precedents into the different context of "custody." And, consequently, the Ninth Circuit also resolved the controversial question of whether, under the restrictions on habeas corpus relief imposed by § 2254(d), a state court's decision may be deemed an "unreasonable application" of "clearly established law" under this Court's precedents if it does not anticipate such an extension of this Court's precedents into a novel setting. There is a split in the circuits on these points. And the Ninth Circuit's extension of precedent will

exert a significant impact not only upon the state courts, but also upon law enforcement officers, who will now be faced with the prospect that identical police conduct will not be deemed "custody" for some individuals, but will be for others.

I.

The Ninth Circuit has decided an important and recurring issue regarding "custody" for *Miranda* purposes that conflicts with decisions of this Court, has caused a split among the circuit courts of appeals, and has placed a significant burden on law enforcement.

For the first time by a circuit court of appeals, the Ninth Circuit held that, in determining whether a juvenile was in custody for *Miranda* purposes, a court must consider the person's "juvenile status" (i.e., the juvenile's age and experience). App. A18-A20, A23-A24. The decision below creates a new standard for an "in custody" determination for the purposes of *Miranda* when the person questioned is a juvenile, in that it conflicts with this Court's decision in *Berkemer v. McCarty*, 468 U.S. 420 (1984), and has caused a split among the circuit courts of appeals. It also has a significant impact upon law enforcement.

1. *Miranda* warnings are required only when a person interviewed by the police is "in custody." *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Miranda*, 384 U.S. at 444. In determining whether a person was "in custody" at a particular time, "the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. at 442. Although the circumstances of each case must certainly influence a determination of whether a person is "in custody" for *Miranda* purposes, the *ultimate* inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

This Court has held that the reasonable person test is an objective test which does not "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" *Berkemer*, 468 U.S. at 442, n.35 (quoting *People v. P.*, 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260 (1967)). Considering a juvenile's age and experience is contrary to the objective reasonable person test for indicia of arrest set forth by this Court's cases. Age and experience are individual characteristics and do not directly reflect the degree of restraint on freedom of movement. Indeed, in *People v. P.*, 233 N.E.2d 255, which has been quoted with approval by this Court (*see Berkemer*, 468 U.S. at 442 n.35), the court applied a reasonable person test to a sixteen-year-old defendant, *not* a modified test. *People v. P.*, 233 N.E.2d at 256, 260-61.

The Ninth Circuit arrived at its contrary conclusion by failing to recognize the fundamental difference between an "in custody" determination for *Miranda* purposes and a determination of the voluntariness of a confession or a waiver of constitutional rights. *See* App. A18-A19. Unlike in the objective reasonable person test for an "in custody" determination, age is logically relevant in determining the voluntariness of a confession or a waiver of constitutional rights. *See Stein v. New York*, 346 U.S. 156, 185-86 (1953) (characteristics of the accused relevant to determining the voluntariness of a confession include the accused's *age*, sophistication, prior experience with the criminal justice system, and emotional state), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979) (question of voluntary waiver of constitutional rights is determined on the "'particular facts and circumstances of the case, including the background, experience, and conduct of the accused.'"). Age is a relevant factor for determining the voluntariness of a confession or a waiver of constitutional rights because both inquiries analyze the accused's state of mind, i.e., whether the accused voluntarily gave the confession or voluntarily waived constitutional rights.

An "in custody" determination for *Miranda* purposes, however, is different from a determination of whether a confession or waiver of constitutional rights was voluntarily given. "Juvenile status" is not relevant to an "in custody" determination, because the *ultimate* inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. at 1125. The purpose of an "in custody" determination is to gauge whether there is an indicia of custody associated with formal arrest to require law enforcement officers to give *Miranda* warnings. Consequently, the person's state of mind has no substantial relevance to the indicia of custody. The Ninth Circuit failed to recognize this fundamental difference, and in essence has converted the "in custody" determination for *Miranda* purposes into the same test for determining whether a confession is voluntary.

2. Moreover, the decision below directly conflicts with the decision of at least one other circuit, and is at least inconsistent with decisions of two other circuits. In *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998), the defendant, a thirteen-year-old juvenile, argued on appeal that "[a] child with [E.L.'s] characteristics would reasonably feel unable to leave or to request that officers leave under the circumstances in which [E.L.] found himself." The Tenth Circuit held that in evaluating whether the defendant was in custody, only the restraint imposed by the officers was a relevant consideration. The Tenth Circuit held that the defendant's particular traits were irrelevant under the objective standard unless the officers were aware of the particular traits *and* those traits influenced the actions of the officers. *Id.* at 1247-48. The Tenth Circuit stated:

> Finally, to the extent that E.L.'s brief can be read as inviting this court to reach out to create a dual track for "in custody" determinations by making such determinations objective when the suspect is an adult but subjective when the suspect is a child, we decline

> the invitation. Not only is it unwise to place such a burden on law enforcement, but such an approach is directly contrary to the approach adopted by the Supreme Court.

Erving L., 147 F.3d at 1248 (citing *Berkemer*, 468 U.S. at 442 n.35).[1/]

The decision below is also at least inconsistent with decisions of the Sixth and Eighth Circuits. In *United States v. Macklin*, 900 F.2d 948, 949-51 (6th Cir. 1990), the Sixth Circuit held that a reasonable person test, rather than a subjective test, is appropriate to determine whether a mildly retarded suspect was in custody. In so holding, the Sixth Circuit cited to this Court's opinion in *Berkemer*, 468 U.S. at 442 n.35. *Macklin*, 900 F.2d at 951. In *United States v. J.H.H.*, 22 F.3d 821, 831 (8th Cir. 1994), the fourteen-year-old defendant argued that his police interview was a custodial interrogation and his statement was coerced by threats. The Eighth Circuit's detailed analysis rejecting the claim does not address or analyze the "juvenile's status," (i.e., age and experience). *See id.*

3. Resolution of this conflict among the circuits is vital because law enforcement agencies are presently subject to inconsistent mandates as to when *Miranda* warnings must be given to juveniles. This issue will necessarily arise whenever juveniles are questioned by law enforcement officers. The

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1. The Ninth Circuit asserted that *Erving L.* modified the objective standard to account for the defendant's status, based on language in *Erving L.* "Given these facts, *a reasonable juvenile*, in E.L.'s position. . ." App. A14 (emphasis in original). *Erving L.* does contain the words "reasonable juvenile" in one sentence. But, read in its entirety, *Erving L.* rejects a modification of the reasonable person test. Indeed, the Tenth Circuit concludes the "in custody" analysis with a clear indication that it used a reasonable person test: "Because a reasonable person in E.L.'s position would not have believed that he was subjected to the functional equivalent of formal arrest, this court reverses the district court's conclusion that E.L. was in custody for *Miranda* purposes." *Erving L.*, 147 F.3d at 1248.

Ninth Circuit's decision below introduces an element of uncertainty because not all similarly-situated persons will be considered to be in custody. It is, of course, a goal of this Court's jurisprudence on *Miranda* custody to provide effective guidance to law enforcement. *See Thompson v. Keohane*, 516 U.S. 99, 115 (1995). Moreover, the practical consequence of the Ninth Circuit's decision is that law enforcement officers will not be able to determine whether *Miranda* rights should be given to a juvenile unless they can divine the age and experience of the juvenile. This is an unwarranted burden to place upon law enforcement officers. *See Berkemer*, 468 U.S. at 442 n.35.

II.

The circuit Courts of Appeals are divided over whether a State court adjudication can be deemed "objectively unreasonable" for purposes of 28 U.S.C. § 2254, where the State court declines to "extend" the rule of a Supreme Court precedent to a new context.

Under 28 U.S.C. § 2254(d), a federal court may not grant habeas corpus relief to a state prisoner on a claim adjudicated on its merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." In *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000), this Court stated:

> The Fourth Circuit also held in *Green* [*v. French*, 143 F.3d 865 (4th Cir. 1998)] that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend) a legal principle to a new context where it should apply should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. *See* 143 F.3d at 869-70. Although that holding may perhaps be correct, the classification does have some

> problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context.

Williams, 529 U.S. at 408. This Court concluded, however, that, "[t]oday's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)." *Id.* at 408-09. Following this Court's decision to decline to address how such "extension of legal principle" cases should be treated, the circuits now have split on the proper treatment of such cases.

In the decision below, the Ninth Circuit recognized that this Court "has not had a specific occasion to analyze how a defendant's juvenile status may alter an 'in custody' determination." App. A22. And, the court acknowledged that its analysis "involves the extension of the principle that juvenile status is relevant to the conduct of a custodial interrogation to the further determination whether a defendant is, in fact, 'in custody.'" App. A23. Despite the foregoing, the Ninth Circuit held that, under 28 U.S.C. § 2254(d)(1), it was objectively unreasonable for the state court to have failed to extend consideration of a defendant's juvenile status from the context of voluntary confession and waiver of constitutional rights to the context of "in custody" determination for *Miranda* purposes. App. A22-A26.

Pointing to the decision below, the Eleventh Circuit in *Hawkins v. Alabama*, 318 F.3d 1302, 1306 n.3 (11th Cir. 2003), criticized the Ninth Circuit's requirement that state courts extend Supreme Court precedent. In a sophisticated analysis, the Eleventh Circuit noted that the word "extend" does not appear in § 2254(d). The court stated, "'Extend' can mean different things at different times." *Id.* (citing *Brumley v. Wingard*, 269 F.3d 629 (6th Cir. 2001) and *Alvarado*, 318 F.3d

841). The Eleventh Circuit delineated one meaning of "extend":

> Extend might only mean to apply the ratio decidendi of Supreme Court decisions fully and completely (and not in some crabbed way) so that the rule of law covers new and different facts and circumstances as long as the new facts and circumstances -- objectively reasonably viewed -- are materially or, put differently, substantially the same that were in the mind of the Supreme Court when it laid down the rule.

Id. at 1306 n.3. The *Hawkins* court reasoned that this meaning of "extend" caused no conflict between 28 U.S.C. § 2254(d) and a rule requiring state courts to extend Supreme Court precedent. *Id.*

Disagreeing with the Ninth Circuit's interpretation of "extend," the Eleventh Circuit explained the meaning of "extend" as the Ninth Circuit had used it in the decision below:

> But "extend" in a different sense, can mean to "widen the range, scope, area of application of (a law, operation, dominion, state of things, etc.); to enlarge the scope of meaning of (a word)." 5 *The Oxford English Dictionary* 595 (2d ed. 1989). *See generally Alvarado*, 2002 WL 31829483 at *9, at —. In this sense, we see an impermissible conflict with Congress's expressed intent in [28 U.S.C. § 2254(d)].

Id. The *Hawkins* court explained as follows:

> We reject that Congress intended for [28 U.S.C. § 2254(d)'s] protection for state court decisions to be conditioned on the state court's widening, or enlarging, the rules made by Supreme Court decisions. To widen the scope of or to enlarge Supreme Court rules is not to

follow "clearly established" Supreme Court law, but is to innovate.

Id. The Eleventh Circuit held that under 28 U.S.C. § 2254(d), a state court is not required to predict that the Supreme Court might widen its rule if the Supreme Court were faced with new and substantially different circumstances. *Id.*

Here, in contrast, the Ninth Circuit required the state court to predict that this Court would widen its rules if faced with new and substantially different circumstances.[2/] The Ninth Circuit noted in the decision below that the state court had adhered to this Court's objective test in determining "custody" for *Miranda* purposes. App. A7 (stating that the California Court of Appeal identified the correct legal standard for making an "in custody" determination). The Ninth Circuit, however, then held that under § 2254(d)(1), it was objectively unreasonable for the state court to have failed to extend consideration of a defendant's juvenile status from the context of voluntary confessions and waiver of constitutional rights to the context of "in custody" determinations for purposes of *Miranda*, an entirely different area of law. App. A26.

The decision below presents, precisely, the problem of whether a state court decision may be condemned as objectively unreasonable for failing to extend a legal principle to a new context under § 2254(d)(1). *See Williams v. Taylor*, 529 U.S. at 408. Given the conflict between the circuits, guidance from this Court in how to treat such "extension of legal principle" cases under 28 U.S.C. § 2254(d)(1) is now necessary.

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2. Although not raised by the Warden below, it was also improper for the Ninth Circuit to grant federal habeas relief in the decision under *Teague v. Lane*, 489 U.S. 288, 299-300 (1989), which is similar to the "clearly established" portion of § 2254(d). *Williams*, 529 U.S. at 412. It has been recognized that *Teague* prohibits extending a prior decision into a "novel setting." *See Stringer v. Black*, 503 U.S. 222, 228 (1992).

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 9, 2003

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ALVARADO, *Petitioner-Appellant,* v. R.Q. HICKMAN, WARDEN, Acting Warden of Mule Creek State Prison, *Respondent-Appellee.*	No. 00-56770 D.C. No. CV 00-00326-VAP/E ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
January 14, 2002—Pasadena, California

Filed December 18, 2002
Amended February 11, 2003

Before: Mary M. Schroeder, Chief Judge,
Richard D. Cudahy,* and M. Margaret McKeown,
Circuit Judges.

Opinion by Judge Cudahy

*The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/
Defendants and Accused, Rights of

The court of appeals reversed a judgment of the district court. The court held that a 17-year old suspect is "in custody" for the purpose of determining whether the suspect needed to be advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), when the police inform the suspect's mother that they "need" to speak with the suspect; the suspect's parents are refused permission to be present during a police interview; the police repeatedly pressure the suspect to tell the "truth" after the suspect denies any knowledge or involvement in a crime; only after a substantial amount of incriminating material is obtained from the suspect is the suspect told he can use the phone; and, the suspect is only told at the end of the interview that he is free to go.

Approximately one month after a murder occurred at a shopping mall in Santa Fe Springs, California, Sheriff's Detective Cheryl Comstock contacted appellant Michael Alvarado's mother at her place of employment and informed her that police officials "needed" to speak to her. Both Alvarado's mother and father accompanied their son to the sheriff's station; however, they were refused permission to be present during the interview. At the time, Alvarado was 17 years old, had no criminal history, and had never been questioned by the police. The interview, which was conducted exclusively by Comstock, lasted approximately two hours. During that time, Alvarado was not given a statement to sign indicating in any manner that he was participating voluntarily in the interview, nor was he advised of his *Miranda* rights. Despite the fact that Alvarado initially denied any knowledge or involvement in a crime, Comstock repeatedly pressured

Alvarado to tell the "truth." Shortly thereafter, Alvarado began to divulge details of the murder and of his role in hiding the murder weapon. Only after a substantial amount of incriminating material had been obtained, Alvarado was told that he could use the phone, and only at the end of the interview did Comstock inform Alvarado that he was free to go.

Alvarado was subsequently charged with murder and attempted robbery in state court. During the jury trial, Alvarado's statements during the interview were admitted into evidence. Alvarado later took the witness stand in his own defense. Ultimately, Alvarado was convicted of second degree murder and attempted robbery. His conviction was subsequently affirmed by the California Court Appeal, and his petition for review by the California Supreme Court was denied. Alvarado then filed a petition for habeas corpus in federal district court, claiming that his Fifth Amendment rights were violated because he incriminated himself without ever being informed of his rights under *Miranda*. The magistrate judge recommended that the petition be dismissed. The district court denied Alvarado's petition.

Alvarado appealed.

[1] *Miranda* warnings are required only when suspect interviewed by the police is "in custody." The test for a custody determination is whether, under the totality of circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. **[2]** Several factors are relevant to the determination, including: (1) the language used by the officer to summon the individual; (2) the extent to which he or she is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and, (5) the degree of pressure applied to detain the individual.

[3] Alvarado's status as a minor was an important subsidiary issue that potentially altered the constitutional analysis. **[4]** A criminal defendant's age is a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary. **[5]** The Supreme Court has noted that

special problems may arise with respect to waiver of the privilege against self-incrimination by or on behalf of children, and has stated that when counsel was not present when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair. **[6]** Instead of exercising the "greatest care" to ensure that Alvarado's statements were not the product of his youth and inexperience with police, Comstock essentially ignored Alvarado's status as a minor.

[7] Based on the Supreme Court's jurisprudence dealing with the special due process considerations that pertain to juvenile defendants, there was no reason why similar safeguards, commensurate with the age and circumstances of a juvenile defendant, would not apply equally to an "in custody" determination. Moreover, the issue of parental involvement, at the behest of police officials, to arrange the police interview with Alvarado and the subsequent refusal by police to let his parents attend the interview were relevant issues in the totality of circumstances.Considering these factors, a reasonable 17-year-old in Alvarado's position would not have felt at liberty to terminate the interrogation and leave.

[8] Further, it had to be concluded that the improper admission of Alvarado's statements during the interrogation by Comstock, which were tape-recorded and played in open court, had a substantial and injurious effect on the jury's verdict. **[9]** Thus, the district court's denial of Alvarado's petition for writ of habeas corpus had to be reversed and the matter remanded to the district court for entry of judgment granting a conditional writ of habeas corpus to Alvarado.

COUNSEL

Tara K. Allen, Malibu, California, for the petitioner-appellant.

Deborah J. Chuang, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

ORDER

On consideration of the petition of the Appellee for rehearing with suggestion for rehearing en banc filed December 31, 2002, in the above-captioned case, no member of the court requested a vote on the en banc request and all of the judges on the panel have voted to deny a rehearing.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

The Appellant's emergency motion for immediate release is DENIED.

The Appellee's emergency motion for modification of the opinion is GRANTED.

The opinion of this court in the above-captioned case issued December 18, 2002, is amended as follows:

Slip Op. page 29, lines 27-31, change "Alvarado's petition for a writ of habeas corpus is GRANTED. We VACATE his state court conviction for second degree murder and attempted robbery. If a retrial of the defendant is in prospect, it shall be undertaken within 120 days of entry of this judgment."

to

"The district court's denial of Alvarado's petition for writ of habeas corpus is REVERSED. On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state begins trial proceedings within 120 days of the issuance of the mandate."

OPINION

CUDAHY, Circuit Judge:

Michael Alvarado was convicted of second degree murder and attempted robbery and is currently serving a 15-year to life sentence in California state prison. Alvarado's conviction was obtained primarily based on statements he made during a two-hour interrogation that occurred when he was 17 years old. Alvarado now seeks a writ of habeas corpus, alleging that he was deprived of his Fifth Amendment rights in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The district court denied Alvarado's request for relief. Our review of this case is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which permits us to grant a federal writ of habeas corpus only if the underlying state court decision is either contrary to, or an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

In *Haley v. Ohio*, 332 U.S. 596 (1948), the Supreme Court established the legal principle that juvenile defendants are, in general, more susceptible to police coercion than adults; as such, due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation. *Id.* at 599-601. During the last half century, the Court has consistently reaffirmed this principle. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 693 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). To date, the Supreme Court has not directly addressed the issue of how a defendant's juvenile status modifies an "in custody" determination for the purposes of *Miranda*. However, *Haley* and its progeny are highly instructive precedents to the case now before us. If a juvenile is more susceptible to police coercion during a custodial interrogation, then the same juvenile is also more susceptible to the impression that he is, in fact, in custody in the first instance.

In this case, the California Court of Appeal identified the correct legal standard for making an "in custody" determination. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (stating that an "in custody" determination requires an inquiry into whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave").[1] But the California Court of Appeal (and the district court upon habeas review) failed to address how Alvarado's juvenile status, including the involvement of his parents at the behest of the police, affected the "in custody" determination. Relevant Supreme Court precedents lead us to conclude that Alvarado's youth and inexperience with the police are simply too important to be ignored. Moreover, on the facts of this case, proper consideration of this additional factor compels a different outcome, even under the highly deferential standard of review mandated by the AEDPA. We therefore REVERSE the judgment of the district court.

I.

The underlying facts of this case are not in dispute. On the night of September 22, 1995, a murder occurred at a shopping mall in Santa Fe Springs, California. Approximately one month later, Sheriff's Detective Cheryl Comstock contacted the defendant's mother at her place of employment and informed her that police officials "needed" to speak to her son, Michael Alvarado. Alvarado's mother told Comstock that Michael's father would bring him to the Sheriff's station so he could be interviewed. Both Alvarado's mother and

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1. The state court cited another state court opinion, but the standard for making the in custody determination is the same as the relevant federal standard. *See People v. Soto* [*& Alvarado, et al.*], No. 97DA2213, slip. op. at 12,18 (Cal. Ct. App., 2d Dist., Sept. 13, 1999) (*Soto*) (citing *People v. Ochoa*, 19 Cal. 4th 353, 401-02 (1998)).

father accompanied their son to the Sheriff's station. However, they were refused permission to be present during the interview. When these events occurred, Alvarado was 17 years old, had no criminal history and had never been questioned by the police.

The interview, which was conducted exclusively by Comstock, lasted approximately two hours. During that time, Alvarado was not given a statement to sign indicating in any manner that he was participating voluntarily in the interview, nor was he advised of his *Miranda* rights. Alvarado initially offered an account of his activities on the night of the murder that did not include reference to the shooting or to the hiding of a gun (the most incriminating aspects of his subsequent statements). Comstock then expressed disbelief at Alvarado's version of events and informed him that she, in fact, had witnesses who said "quite the opposite." Shortly thereafter, Alvarado began to divulge details of the murder and of his role in hiding the murder weapon. Well into the course of the interview, and after Alvarado had started talking about the shooting and the hiding of the gun, Comstock made comments implying that Alvarado would be going home at the end of the interview. Alvarado's statements during the interview were admitted into evidence at trial. Alvarado later took the witness stand in his own defense.

Alvarado was convicted of second degree murder and attempted robbery in a jury trial. His conviction was subsequently affirmed by the California Court of Appeal on September 13, 1999. In both the trial court and on appeal, Alvarado raised his age as a relevant factor in the *Miranda* analysis. Unfortunately, the decision of the California Court of Appeal did not specifically discuss whether Alvarado's juvenile status altered the *Miranda* analysis. Instead, the court concluded that "a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave. The interrogation was not custodial and no *Miranda* warnings were required." *Soto*, No. 97DA2213, slip op. at 18.

From the face of the opinion, it does not appear that Alvarado's age and inexperience with the police were included as part of the "in custody" analysis. In October 1999, Alvarado filed a Petition for Review in the California Supreme Court, which was denied on December 15, 1999.

On March 6, 2000, petitioner filed a petition for habeas corpus, pursuant to 28 U.S.C. § 2254, in the district court. On July 5, 2000, a magistrate judge issued a report recommending that the district court dismiss the petition with prejudice. Applying a totality of circumstances standard for determining whether Alvarado was in custody, the magistrate judge concluded that a reasonable person during the interrogation would have felt free to leave; therefore, Alvarado was not "in custody" during the interview.

On August 8, 2000, the district court adopted the magistrate's report and recommendation and denied Alvarado's petition. The district court also denied Alvarado's request for a certificate of appealability. On December 6, 2000, this court granted Alvarado's certificate of appealability with respect to one issue: "whether statements made by defendant were erroneously admitted by the trial court in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)."

II.

A denial of a writ of habeas corpus presents a question of law that is reviewed de novo, though factual findings will be reviewed for clear error. *See Hartman v. Summers*, 120 F.3d 157, 160-61 (9th Cir. 1997); *Perez v. Marshall*, 119 F.3d 1422, 1425-26 (9th Cir. 1997). A determination whether an individual is "in custody" for the purposes of *Miranda* warnings "is really a mixed question of law and fact, which is subject to de novo review by appellate courts"; however, the "state trial court's answers to the 'scene- and action-setting questions' (i.e., the underlying factual questions) still are entitled to a presumption of correctness." *Bains v. Cambra*, 204

F.3d 964, 972 (9th Cir. 2000) (citing *Thompson*, 516 U.S. at 111-12).

This case is, of course, a collateral appeal filed pursuant to 28 U.S.C. §§ 2253, 2254. Several years ago, the AEDPA modified these statutory sections and made more deferential the standard of review to be applied by a federal court in examining the claims of a prisoner under judgment of a state court. In this circuit, review of a habeas petition under the AEDPA requires a two-stage inquiry. The first question is "whether the state court erred at all." *Anthony v. Cambra*, 236 F.3d 568, 578 (9th Cir. 2000) (citing *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000)). If the answer is yes, then we apply the AEDPA standard of review, which inquires whether the state court's "error" was contrary to, or involved an unreasonable application of, clearly established federal law, as defined in the precedents of the U.S. Supreme Court. *See* 28 U.S.C. § 2254(d)(1); *Van Tran*, 212 F.3d at 1155 ("Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law under AEDPA, promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value."). We now address in order the two stages of this inquiry.

A.

[1] In the case now before us, Alvarado claims that his Fifth Amendment rights were violated because he incriminated himself without ever being informed of his rights under *Miranda*. 384 U.S. at 444. The Supreme Court's holding in *Miranda*, of course, generally precludes the evidentiary use of statements resulting from a custodial interrogation unless the suspect has been first advised of his or her constitutional rights. *See Stansbury v. California*, 511 U.S. 318, 322 (1994); *Miranda*, 384 U.S. at 444. Although *Miranda* warnings are

required only when a suspect interviewed by the police is "in custody," *Stansbury*, 511 U.S. at 322; *Miranda*, 384 U.S. at 444, Alvarado asserts that he easily passes the Supreme Court's test for a custody determination, which is whether, under the totality of circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112; *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (holding that "the only relevant inquiry [to determine whether a suspect was 'in custody'] is how a reasonable man in the suspect's position would have understood his situation").

[2] Ninth Circuit case law has further elaborated the "totality of circumstances" inquiry by identifying several factors that are relevant to the "in custody" determination:

> Pertinent areas of inquiry include [1] the language used by the officer to summon the individual, [2] the extent to which he or she is confronted with evidence of guilt, [3] the physical surroundings of the interrogation, [4] the duration of the detention and [5] the degree of pressure applied to detain the individual. Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.

United States v. Booth, 669 F.2d 1231, 1235 (9th Cir. 1981); *accord United States v. Butler*, 249 F.3d 1094, 1099 (9th Cir. 2001); *United States v. Gregory*, 891 F.2d 732, 735 n.3 (9th Cir. 1989).

Under the specific facts of this case, Alvarado presents a compelling argument. Detective Comstock contacted Alvarado's mother at her place of employment and informed her that the police "needed" to speak with her son. Both parents then accompanied Alvarado, who was then only 17 years old, to

the Sheriff's station so that he could be interviewed. Despite the fact that Alvarado had never been questioned by police before, his parents were refused permission to be present during the interview. Alvarado was then escorted to an interrogation room, where Detective Comstock conducted a two-hour interview about the events of September 22, 1995. Despite the fact that Alvarado initially denied any knowledge or involvement in a crime, Comstock repeatedly pressured Alvarado to tell the "truth" as purportedly disclosed by the three notebooks of notes she had compiled from her interviews with alleged witnesses to the crime. Well into the course of the interview, after a substantial amount of incriminating material had been obtained, Alvarado was told that he could use the phone. Only at the end of the interview did Comstock inform Alvarado that he was free to go.

In response, the State argues that Supreme Court precedents have consistently held that when a suspect is not placed under arrest, voluntarily goes to the police station and is allowed to leave unhindered by the police after a brief interview, a finding of custody for *Miranda* purposes is unwarranted. *See, e.g.*, *California v. Beheler*, 463 U.S. 1121, 1122-25 (1983) (no custody found when suspect voluntarily came to police station, was told he was not under arrest and was allowed to leave after thirty minute interview); *Oregon v. Mathiason*, 429 U.S. 492, 493-95 (1977) (no custody found when officer left card at suspect's home stating that he would "like to discuss something" and to call, suspect voluntarily came to police station, was told he was a suspect, and was allowed to leave at conclusion of thirty minute interview). Moreover, the State points out that a determination of custodial interrogation does not necessarily follow from the fact that the interviewee is suspected of a crime, is questioned in the confines of a police station or is subjected to trickery or deceit during the course of the police interview. *See Mathiason*, 429 U.S. at 495-96 (police falsely stated that suspect's fingerprints had been found at the scene of the crime). In the instant case, the State argues that Comstock merely told Alvarado that she did not believe his version of the September 22 events.

Nevertheless, Alvarado makes a strong case that *Mathiason*, a principal case relied on by the district court to deny Alvarado's *Miranda* claim, is distinguishable on several grounds. First, the suspect in *Mathiason* came to the police station voluntarily and was told immediately that he was not under arrest. *Id.* at 495. In contrast, arrangements for the Alvarado interview were made by his parents, who accompanied him to the police station; moreover, Alvarado was never told he was *not* under arrest. Second, the interview in *Mathiason* lasted only thirty minutes, and the suspect admitted his guilt within the first five minutes. *Id.* at 493. In the case now before us, Alvarado was interviewed for a full two hours and repeatedly denied any involvement in the shooting incident. Only after he was subjected to various interrogation tactics designed to break down his defenses did he offer any incriminating statements. Moreover, these statements occurred well into the course of the interview.[2] Third, the suspect in *Mathiason* was a parolee who obviously had some knowledge of the criminal justice system. *Id.* In contrast, Alvarado had no prior experience with the police. To buttress this point, Alvarado directs our attention to *Minnesota v. Murphy*, 465 U.S. 420 (1984), which reasoned:

> Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and

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2. The record contains 61 pages of interview transcript. Discussion of the shooting—and Comstock's disbelief in Alvarado's initial account of events—does not begin until page 20, approximately one-third of the way into the two hour interview. Thus, approximately 40 minutes had elapsed before Alvarado began to discuss his knowledge of the shooting and his role in hiding the murder weapon.

> to insulate him from psychological intimidation that might overbear his desire to claim the [Fifth Amendment] privilege.

Id. at 433 (ruling that parolee who gave incriminating testimony during scheduled meeting with parole officer was not "in custody" for purposes of *Miranda*).

Based on these considerations, we agree with Alvarado that the Supreme Court authorities relied on by the state court do not control the specific facts of this case. Namely, Alvarado was only 17 years old and had no criminal history when the interview occurred, it lasted for approximately two hours (the interviews in *Mathiason* and *Beheler* lasted thirty minutes) and his parents, who brought Alvarado to the police station at the request of Detective Comstock, were refused permission to be present during the interview.

[3] Although both Alvarado and the State make their "in custody" arguments under an objective standard, Alvarado's status as a minor is an important subsidiary issue that potentially alters the constitutional analysis. Unfortunately, this issue was essentially ignored in the prior state and federal court proceedings. The State cites *United States v. Erving L.*, 147 F.3d 1240 (10th Cir. 1998), to establish that the standard for evaluating the existence of "custody" remains objective. However, our own reading of *Erving L.* suggests that the Tenth Circuit did employ the objective standard, but modified it to account for the defendant's status as a minor. *See id.* at 1248 ("Given these facts, *a reasonable juvenile* in E.L.'s position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest.") (emphasis added). Alvarado seems to adopt a similar age-modified objective standard, albeit without legal citation, when he makes the following argument:

> A reasonable 17-year-old with no prior experience with being questioned by law enforcement would most likely believe that if he is at a police station being questioned by a police officer and the officer is stating repeatedly that she knows that he is lying and he is being cajoled to tell the truth, that he is not free to get up and leave, at least not until he has satisfied the officer's desire for the "truth."

Appellant's Br. at 16.

[4] Under the Supreme Court's due process jurisprudence, a criminal defendant's age has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary. *See, e.g., Withrow*, 507 U.S. at 693 (noting that a defendant's "maturity" is one of the factors used to determine if a defendant's confession was voluntary); *Michael C.*, 442 U.S. at 725 ("Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination."); *Schneckloth*, 412 U.S. at 226 (stating that determination whether consent to search a car was voluntary is made under the totality of circumstances, including "the youth of the accused"); *In re Gault*, 387 U.S. at 45 ("This court has emphasized that admissions and confessions of juveniles require special caution."); *Gallegos*, 370 U.S. at 54 (ruling under the totality of circumstances that confession of 14-year old to charges of assault and robbery could not be "compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); *Haley*, 332 U.S. at 599-601(ruling that murder confession made by 15-year old without consultation with counsel or parents "cannot be judged by the more exacting standards of maturity" and that defendant's due process rights had thus been violated).

Another possible dimension of the present case is how parental authority over a minor, who happens to be a criminal suspect, affects the "in custody" determination. This aspect

may be particularly difficult to analyze because custodial status may be viewed as essentially ancillary to the issue of coercion. That is, certain police actions may be coercive in part because they take place in a setting where the suspect does not reasonably feel free to leave, and thereby escape the application of coercive measures.

Here, the involvement of Alvarado's parents and, most relevantly, their absence from the interrogation at the behest of the police, may be significant factors in the events leading up to his incriminating statements. First, Comstock enlisted the parental control of Alvarado's parents over their minor son by approaching Alvarado's mother rather than going directly to him. So the delivery of Alvarado to the sheriff's station (with its consequent restriction of his freedom of movement) was effected indirectly by Comstock (but with the intervening aid of the parents) and without any manifestation of assent by Alvarado to the exercise of official authority. Second, Alvarado was denied the protective presence of his parents when Comstock denied their request to be present during the interview. Their "protective presence" would appear, at least on the face of things, to be more relevant to the coercive conduct of the interview than to their having any role in facilitating Alvarado's freedom to leave the interrogation room.[3/]

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3. Although the ambiguous role of Alvarado's parents in contributing to the "in custody" prong of the analysis (in contrast to their significance to the larger issue of coercion) is hard to parse, we are aware of the Supreme Court's admonition in *Colorado v. Connelly*, 479 U.S. 157 (1986), that "the Fifth Amendment Privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' " *Id.* at 170 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). And in *Erving L.*, the Tenth Circuit determined that *Connelly* applied to a juvenile setting where the suspect's parents urged him to "cooperate with the officers to 'clear his conscience.' " 147 F.3d at 1248. Neither *Erving L.*'s quite distinguishable exercise of parental intervention nor the dicta in *Connelly* involving the coercive significance of a psychotic "voice of God" seem to have much to do with the role of the parents in the case before us.

[5] To assess how and whether parental involvement and/or juvenile status affect the "in custody" determination for *Miranda* purposes, we find *In re Gault* instructive. This case also involved the interrogation of a juvenile, although, of course, the "in custody" status itself was not in dispute. 387 U.S. at 42-43. But the reasoning of the Supreme Court is important:

> [T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.
>
> The "confession" of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence, as far as appears.

Id. at 55-56 (footnote omitted).

[6] The "greatest care" principle cited in *Gault* appeared in the context of determining the minimum due process requirements that attach to a juvenile's waiver of his Fifth Amendment privilege against self-incrimination. Yet, if a juvenile is more susceptible to police coercion during a custodial interro-

gation than would be a similarly situated adult, there is no reason why the same juvenile would not similarly be less capable of determining whether he was, in fact, in custody in the first place.[4] In the case now before us, 17 year-old Alvarado was subjected to a two-hour interrogation in a police interrogation room, with Comstock's expressing disbelief in Alvarado's version of events and informing him that she had witnesses who said "quite the opposite." Instead of exercising the "greatest care" to ensure that Alvarado's statements were not the product of his youth and inexperience with police, *id.* at 55, Comstock essentially ignored Alvarado's status as a minor. At a minimum, Comstock could have accommodated Alvarado's parents, who were then waiting in the station lobby, by allowing them to be present during the interview with their son.

[7] When applying the "totality of circumstances" test for an "in custody" determination, we believe that the state court fell short when it failed to address, much less analyze, Alvarado's status as a minor. Based on the Supreme Court's jurisprudence dealing with the special due process considerations that pertain to juvenile defendants, we see no principled reason why similar safeguards, commensurate with the age and

4. The Court's holding in *Gault* was explicitly limited to the adjudicative phase of juvenile proceedings. *See* 387 U.S. at 31 n.48 ("The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process."). The juvenile defendant in *Gault* was convicted of delinquency based solely on a confession that the Court determined was constitutionally defective. *Id.* at 56. The Court thus held that without a valid confession, "a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." *Id.* at 57. However, the fact that the Court limited its holding in this way does not weaken the opinion's persuasive reasoning; rather, it speaks to procedural peculiarities of the juvenile process that are not at issue in the present case.

circumstances of a juvenile defendant, would not apply equally to an "in custody" determination.[5] Moreover, the issue

5. When we survey the landscape of state court decisions, we note that every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the "in custody" determination, either as a factor under the totality of circumstances test, or by way of modification to the reasonable person standard. *See In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002) (ruling that objective test applies to juvenile context, "but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement"); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to determine whether the defendant "would have believed that he was in custody at the time of the interrogation at the police station"); *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. App. 1999) (surveying the large number of state courts that have included age as a factor in an "in custody" determination and adopting a rule that "*expressly* provides for consideration of age under the reasonable-person standard established [by the U.S. Supreme Court] in *Stansbury*") (emphasis added); *State v. D.R.*, 930 P.2d 350, 353 (Wash. Ct. App. 1997) (applying standard of "whether a 14-year-old in [the defendant's] position would have reasonably supposed his freedom of action was curtailed") (quotations omitted); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) (stating that a juvenile in-custody determination "must consider additional factors, such as the juvenile's education, age, and intelligence"); *In re Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (ruling that objective test applied to in-custody determination for *Miranda* purposes, "but with additional elements . . . including the child's age, maturity and experience with law enforcement"); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (en banc) (ruling that "the circumstances of the interrogation, including the length of the interrogation and the fact that it involved an eleven-year-old, would lead a reasonable person in [the defendant's] situation to feel that he had no choice but to stay and listen to the officer") (quotations omitted); *In re Loredo*, 865 P.2d 1312, 1315 (Or. Ct. App. 1993) (constructing test "whether a reasonable person in child's position—that is, a child of similar age, knowledge and experience, placed in a similar environment—would have felt required to stay and answer all of [the officer's] questions"); *In re Robert H.*, 599 N.Y.S.2d 621, 623 (N.Y. App. Div. 1993) ("Under the circumstances, we conclude that a reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene."); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988) ("On the question whether the juvenile was in custody, the test is how a reasonable person in the juvenile's position would have understood his situa-

of parental involvement, at the behest of police officials, to arrange the police interview with Alvarado and the subsequent refusal by police to let his parents attend the interview are certainly relevant issues in the totality of circumstances. *See Thompson*, 516 U.S. at 113 (stating that "in custody" determination is made against the backdrop of historical facts that make up the "totality of circumstances"); *see also* note 3, *supra*.[6] Considering these additional factors in the objective determination of custodial status, we do not believe that a reasonable 17-year-old in Alvarado's position would have felt "at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112; *cf. Berkemer*, 468 U.S. at 442 (holding that "the only relevant inquiry [in an 'in custody' determination] is how a reasonable man in the suspect's position would have understood his situation").

B.

We proceed now to the second level of the prescribed inquiry, which requires the narrower focus whether the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court held that the "contrary to" and "unreasonable application"

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tion."); *People v. Savory*, 435 N.E.2d 226, 230 (Ill. App. Ct. 1982) (stating that "[n]umerous factors" are relevant to the in custody determination, including "the age, intelligence and mental makeup of the accused").

6. State courts have also acknowledged the absence of parents as a relevant factor under the totality of circumstances. *See, e.g., Doe*, 948 P.2d at 173 (ruling that objective test applied to in custody determination for *Miranda* purposes, "but with additional elements . . . including . . . the presence of a parent or other supportive adult"); *State v. J.Y.*, 623 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 1993) (considering "juvenile's age" and "lack of a parent being present" as relevant factors under the totality of circumstances).

clauses represent alternative grounds for habeas relief. *Id.* at 404-05.[7]

The Supreme Court has recently confirmed the narrow inquiry available under the first clause. A state court acts contrary to established precedents if it " 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent.' " *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365 (2002) (citing *Williams*, 529 U.S. at 405).

Under the second clause, a state court's decision involves an "unreasonable application" of federal law if it either (1) correctly identifies the governing legal rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002) (citing *Van Tran*, 212 F.3d at 1148); *Anthony*, 236 F.3d at 578 (citing *Williams*, 529 U.S. at 404-06). As explained, *infra*, we believe this case is best analyzed under the "unreasonable application" clause of the AEDPA.

In reviewing a state court judgment under the AEDPA, "we examine the state court's last reasoned decision." *Benn v. Lambert*, 283 F.3d 1040, 1052 n.7 (9th Cir. 2002); *see also Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Our analysis under the "unreasonable application" clause is guided by the doctrine of "clear error." *Anthony*, 236 F.3d at 578. Under this standard, reversal is warranted "only

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7. *Williams* resulted in a highly fractured decision by the Supreme Court in which only specific parts of the lead opinion by Justice Stevens were adopted by a majority of the Court. 529 U.S. at 367. However, Part II of Justice O'Connor's concurrence was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas and Scalia, thus making it the opinion of the Court for matters discussed in it. *Id.* at 399. Part II of Justice O'Connor's concurrence addresses the proper interpretation of 28 U.S.C. § 2254(d)(1), which is at issue in the case now before us.

where the court of appeals is left with a 'definite and firm conviction' that an error has been committed." *Id.* (quoting *Van Tran*, 212 F.3d at 1153).

Finally, a critical factor to bear in mind when analyzing a case under the "unreasonable application" clause is whether the relevant Supreme Court precedents can be fairly categorized as "clearly established" federal law. § 2254(d)(1). In *Williams*, the Supreme Court ruled that the phrase "clearly established Federal Law, as determined by the Supreme Court of the United States," § 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions." 529 U.S. at 412; *see also Tyler v. Cain*, 533 U.S. 656, 664 (2001) (stating that " 'determined' and 'held' are synonyms in the context of § 2254(d)(1)"). We determine de novo what is "clearly established federal law" within the meaning of the AEDPA. *LaJoie v. Thompson*, 217 F.3d 663, 668 (9th Cir. 2000); *Canales v. Roe*, 151 F.3d 1226, 1228-29 (9th Cir. 1998). If the federal law is not clearly established at the time of the state court determination, § 2254(d)(1) bars relief. *Williams*, 529 U.S. at 412.

We begin our AEDPA analysis by stating that Supreme Court case law has clearly established the general right that an interrogation without *Miranda* warnings violates the Fifth Amendment where, under the totality of circumstances, a reasonable person would not have felt free to terminate the conversation with police officials and leave; in other words, the person being interviewed is "in custody." *See Thompson*, 516 U.S. at 112; *Stansbury*, 511 U.S. at 322; *Berkemer*, 468 U.S. at 440-42; *Beheler*, 463 U.S. at 1125; *Mathiason*, 429 U.S. at 494-95. Even acknowledging that the Supreme Court has not had a specific occasion to analyze how a defendant's juvenile status may alter an "in custody" determination, it does not follow that it would be *reasonable*, within the meaning of the AEDPA, for the police to ignore a juvenile's age and experience when applying the "totality of circumstances" test.

Turning to the AEDPA framework, we believe this case is best analyzed under the "unreasonable application" clause, which permits a writ of habeas corpus only if the judgment of the state court "(2) . . . fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Anthony*, 236 F.3d at 578 (citing *Williams*, 529 U.S. at 407). The relevant legal principle here, amply supported by Supreme Court precedent, is that juvenile defendants are accorded heightened procedural safeguards commensurate with their age and experience. *Haley* and its progeny, *supra*, have clearly established this principle in the context of custodial interrogations. If juveniles are more susceptible to making "involuntary" confessions or waivers of their constitutional rights while in police custody, under an analogous totality of circumstances inquiry, these same Supreme Court cases compel the conclusion that a reasonable juvenile would be more susceptible to the impression that he "was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112. It cannot reasonably be argued that a factor that is so important in analyzing the conduct of a custodial interrogation can become insignificant in the analysis of the circumstances that give rise to that situation—namely, in the factual setting that determines whether a juvenile is, in fact, "in custody."

In many respects, the present case would be more straightforward if the California Court of Appeal had directly addressed the issue of Alvarado's age and inexperience with the police and concluded that these additional circumstances were simply irrelevant to the underlying question whether Alvarado was "in custody." If the court had made such a ruling (rather than skipping the analysis altogether), the constitutional infirmity would be facially apparent.

Our analysis involves the extension of the principle that juvenile status is relevant to the conduct of a custodial interrogation to the further determination whether a defendant is, in fact, "in custody." But our AEDPA precedents explicitly contemplate the possibility that such an extension may be

required by relevant Supreme Court case law. *See Hernandez*, 282 F.3d at 1142 ("A state court's decision can involve an 'unreasonable application' of Federal law if it . . . 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable."); *Anthony*, 236 F.3d at 578 (same); *Van Tran*, 212 F.3d at 1150 (same).[8] In the case before us, we are compelled to this conclusion by the fact that a totality of circumstances approach applies equally to the appraisal of police conduct and to the "in custody" analysis. At least in the context of determining whether a juvenile "knowingly and voluntarily decided to forgo his [Fifth Amendment] rights to remain silent," the Supreme Court has unequivocally stated:

> The totality approach permits—*indeed, it mandates*—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Michael C., 442 U.S. at 725 (emphasis added).[9]

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8. Additionally, as we have noted, every state court that has addressed this threshold question of how juvenile status affects the "in custody" analysis has ruled that juvenile status is a factor in the "in custody" determination. *See* note 5, *supra*. Of course, these cases often rely upon state court precedents to reach this conclusion. Unless and until a state court has determined that state constitutional protections do not make juvenile status relevant to the "in custody" determination, the applicability of federal constitutional protections would ordinarily not be discussed by the state court's opinion. But, despite our exhaustive research, we have been unable to locate a single state court that has found juvenile status irrelevant. The unusual feature of the present case is that Alvarado squarely raised this issue, but the state court simply failed to undertake a meaningful analysis under either state or federal law.

9. It should be noted that the Court's holding in *Michael C.* has been viewed by some commentators as a retreat from its earlier decisions in which a defendant's juvenile status was arguably the controlling factor in the constitutional analysis. *See, e.g.*, Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 Vand. L. Rev. 1355, 1373-74 (2000) (noting that *Michael C.* "was a constriction of juvenile *Miranda* rights when read against *Haley, Gallegos* and *Gault* . . . ."). In *Michael C.*, the criminal defendant was a 16-year-old with an extensive criminal history who was accused of murder. After the defendant was taken into custody on a murder charge, the police read the defendant his *Miranda* rights. The defendant then requested the presence of his probation officer, which he subsequently argued was, in fact, an assertion of his Fifth Amendment rights. However, much to the chagrin of four dissenting justices, the majority rejected this argument. *See* 442 U.S. at 730 (Marshall, J., dissenting) ("[A] juvenile's request for his probation officer should be treated as a per se assertion of Fifth Amendment rights."); *id.* at 733-34 & n.4 (Powell, J., dissenting) (disputing whether the interrogating officer had exercised "the greatest of care" as required by *Gault* and whether the 16 year-old defendant "was subjected to a fair interrogation free from inherently coercive circumstances"). The central issue that divided the Court in *Michael C.* was the extent to which a criminal defendant's juvenile status altered the waiver analysis under *Miranda*. However, as made clear by the passage from *Michael C.* quoted in the text, juvenile status remains an important factor in a due process waiver analysis. The rule articulated by the majority is in no way diminished by the fact that the four dissenting justices urged an *even more* robust rule affecting juvenile defendants. Indeed, unlike the present case, the juvenile's experience with the police was a major factor in the Court's totality of the circumstances analysis.

The issue of waiver of his Fifth Amendment rights was never reached in the present case because Alvarado was never informed of his *Miranda* rights. And, as we have already noted, the cases upon which the state relies to support its contention that Alvarado was not "in custody" are distinguishable. In contrast to *Beheler* and *Mathiason*, Alvarado's "voluntary" appearance at the police station was not obtained through his own consent but instead through enlisting his mother's authority. Upon his arrival, Alvarado was never informed that he was not under arrest, and Detective Comstock summarily rejected his parents' request to be present during the interview. Alvarado was then escorted to an inter-

rogation room and subjected to a full two hours of questioning. Despite the fact that Alvarado denied any knowledge or involvement in the shooting incident, Comstock repeatedly pressured Alvarado to tell the "truth" as allegedly defined by three notebooks of notes she had compiled from earlier witness interviews. Although Alvarado was permitted to use the telephone, this accommodation was not offered until well into the course of the interview, and only after Alvarado had made several incriminating statements.[10] Only at the end of the interview did Comstock inform Alvarado that he was free to leave.

After identifying these relevant circumstances, it is simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was "at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112. Moreover, when we apply the "clear error" standard, which guides our analysis under the "unreasonable application" clause of § 2254(d)(1), the totality of circumstances in this case is so compelling that we are "left with a 'definite and firm conviction' that an error has been committed." *Anthony*, 236 F.3d at 578 (quoting *Van Tran*, 212 F.3d at 1153).

C.

[8] Before we can conclude that Alvarado is entitled to federal habeas relief, we must consider whether improper admission of his incriminating statements by the state court had a "substantial and injurious effect" on the subsequent jury verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (defining magnitude of constitutional error that is sufficient to justify habeas relief); *Benn*, 283 F.3d at 1052 n.6 (noting that all AEDPA cases must satisfy the requirements of *Brecht*); *Bains*, 204 F.3d at 977 (joining "the vast majority of our sister

10. We estimate that the time elapsed at this point in the interview was approximately 40 minutes. *See* note 2, *supra*.

circuits by deciding that the *Brecht* standard should apply uniformly in all federal habeas corpus cases under § 2254"). Here, we do not hesitate to conclude that the admission of Alvarado's statements during the interrogation by Detective Comstock, which were tape-recorded and played in open court, had a substantial and injurious effect on the jury's verdict.

The state argues that the *Brecht* threshold has not been met because, in the absence of testimony by detective Comstock about the contents of her two-hour interview with Alvarado, the jury would have nonetheless reached a guilty verdict based on the testimony of Manuel Rivera. We disagree. In order to illustrate the relative weakness of Rivera's testimony, we will summarize certain pertinent background facts.

According to Rivera's direct testimony at trial, Rivera, Alvarado, Paul Soto (Alvarado's co-defendant) and several other youths gathered at Rivera's house on the night of September 22, 1995. Rivera testified that throughout the course of the evening he consumed "about two 40-ouncers" of Budweiser along with "Strawberry wine, [and] some more beer." After midnight, the gathering left the house and moved into a parking lot area beside an adjacent shopping center. The victim drove his pick-up truck into the parking lot and stationed himself near a dumpster, where he proceeded to collect cardboard boxes. According to Rivera, Paul Soto uttered the exclamation, "Let's jack," which Rivera interpreted as meaning that Soto and at least some other members of the gathering should steal the pick-up truck. However, at that very moment, Alvarado was in a nearby doughnut store. A few minutes later, Alvarado returned, and Soto repeated the words, "Let's jack." Rivera then testified that Alvarado responded to Soto's suggestion by saying, "Let's do it." Soto and Alvarado then approached the pick-up truck with Soto proceeding to the driver's side and Alvarado approaching the passenger's side. Rivera stated that a conversation between the victim and Soto ensued, but that he could not see the victim from his vantage point. However, he inferred from Soto's

hand gestures that a conversation was taking place. By Rivera's account, the pick-up truck was too far away for him to hear the contents of the conversation. At this point, a shot rang out and the group immediately retreated to Rivera's house. Soto went into Rivera's bedroom to take off a blood-stained shirt. Rivera then came into the bedroom and saw a black semi-automatic revolver on the floor. Rivera continued to testify that he, Soto and Alvarado subsequently went to the park to hide the gun.

Although on direct examination Rivera's account of the evening was fairly coherent, the cross-examination of Rivera by Alvarado's lawyer exposed numerous inconsistencies and weaknesses. Rivera admitted that during his earlier statements to police he had never stated that Soto *twice* uttered the phrase "Let's jack." This ambiguity is relevant because Rivera claimed that Alvarado only heard Soto utter these words the second time, *after* he returned from the nearby doughnut shop. Rivera also acknowledged that on an earlier occasion, he had confided to Alvarado's lawyer, and to a defense investigator for Alvarado, that he really could not say with certainty whether Alvarado had uttered the words, "Let's do it" or a similar exhortation and that his memory had faded since the events of September 22. Moreover, Rivera conceded that he had also smoked marijuana that night and at the time of the shooting was somewhat "stoned." Rivera admitted that from his vantage point he could not see where Alvarado was standing in relation to the pick-up truck. Perhaps most damaging to the state's case, however, was Rivera's bald admission that on several occasions he had told police that *only* Soto and Alvarado had gone to the park to hide the gun, and that all of these earlier statements had been false. Rivera said that he agreed to testify after consulting his lawyer and after he had been offered immunity. Hence, he could not now be prosecuted for any of the crimes involved in the present case.

The cross-examination of Rivera, when considered in the absence of Alvarado's incriminating statements, also casts doubt on the theory that Alvarado and Soto acted in concert. Rivera stated that he had been a close friend of Alvarado for approximately two years before the shooting incident. During that time, he had never seen Soto and Alvarado together, nor did he have any basis to believe that they even knew each before the night in question. Rivera claimed that he himself had just met Soto that evening and that he had no knowledge, before hearing the gunshot, that Soto or anyone else had a gun. Without corroborating evidence, it might seem implausible that Alvarado, who had no prior criminal record, would have agreed to commit a car jacking at gun point with someone he had met only a few hours earlier.

That said, the essential elements of Rivera's story, such as the bloody shirt and the hiding of the gun, are certainly more plausible when corroborated by Alvarado's own self-incriminating statements. If these statements had been excluded from evidence because Alvarado was not given *Miranda* warnings, the entire case against Alvarado would have come down to Rivera's inconsistent account and the testimony of Valerie Garcia (one of the youths who gathered at Rivera's house and later in the adjacent parking lot). Garcia testified that she remembered Soto and Alvarado walking off in the same general direction. Garcia stated that thereafter, when the shooting occurred, she was facing away from the direction of the pick-up truck. We believe that a witness (Rivera), who has been drinking heavily, is plagued by a tricky memory and has been granted immunity with respect to the crime for which Alvarado was prosecuted, is not powerfully credible. And Garcia added precious little that was specific to Rivera's account. There is, therefore, a high probability that Alvarado's improperly admitted statements were the lynchpin of his conviction.

The state attempts to buttress its *Brecht* argument by pointing out that Alvarado testified in his own defense; therefore, his incriminating statements would have been admissible in

any event in rebuttal. *See Oregon v. Hass*, 420 U.S. 714, 723-24 (1975) (evidence obtained in violation of *Miranda* may be used for impeachment); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (same). However, Alvarado's current counsel argues that the strategic decision about whether or not Alvarado should take the stand may have been strongly influenced by the government's use of his confession. Therefore, Alvarado's live testimony can hardly be taken for granted. *See Elstad*, 470 U.S. at 317 (" 'Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.' " (quoting *Harrison v. United States*, 392 U.S. 219, 224-25 (1968))). Based on our own examination of the record, there appears to be a strong possibility that Alvarado, if not confronted by his own statement to Comstock, would not have testified in his own defense. This being the case, we believe that the self-incriminating statements clearly pass the *Brecht* test of having a substantial and injurious effect on the jury verdict.

III.

[9] The district court's denial of Alvarado's petition for writ of habeas corpus is REVERSED. On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state begins trial proceedings within 120 days of the issuance of the mandate.

APPENDIX B

FILED
JUL 5 2000

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALVARADO,	)	NO. ED CV 00-326-VAP(E)
	)	
Petitioner,	)	REPORT AND
	)	RECOMMENDATION OF
v.	)	UNITED STATES
	)	MAGISTRATE JUDGE
R.Q. HICKMAN, Acting Warden of Mule Creek State Prison,	)	
	)	
Respondent.	)	

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" on March 6, 2000. Respondent filed an Answer on June 12, 2000. Petitioner filed a Traverse on July 3, 2000.

BACKGROUND AND SUMMARY OF PETITIONER'S CONTENTIONS

Following a jury trial, Petitioner was convicted of murder and attempted robbery (Clerk's Transcript at 415-16). Incriminating trial evidence included statements made by Petitioner in response to questioning by a Sheriff's investigator.

Petitioner challenges his conviction, arguing he was "in custody" during the investigator's questioning, such that the investigator should have administered *Miranda* warnings to Petitioner. The state courts found Petitioner was not "in custody" during the questioning (Reporter's Transcript ("R.T.") 15; Exhibit B to Motion for Summary Dismissal, etc.," filed March 29, 2000, at 22-29; Exhibit C to "Motion for Summary Dismissal, etc.").

STANDARD OF REVIEW

The Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, signed by the President on April 24, 1996 ("AEDPA"). Therefore, AEDPA's provisions apply. *See Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.) (en banc), *cert. denied*, 522 U.S. 1008 (1997). AEDPA provides, in relevant part, that an application for writ of habeas corpus on behalf of a person in state custody shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) resulted in a decision that was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); *see Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Weighall v. Middle*, 2000 WL 702986 (9th Cir. June 1, 2000); *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000).

SUMMARY OF THE CIRCUMSTANCES ATTENDING THE QUESTIONING

Approximately one month after the crimes, Sheriff's detective Cheryl Comstock ("Comstock") left word at Petitioner's house and with Petitioner's mother that Comstock needed to speak with Petitioner ("Motion to Augment the Record on Appeal, etc.") ("A.R."), lodged June 12, 2000, at 208). Petitioner's mother told Comstock that Petitioner's father would bring Petitioner to the Sheriff's station so Petitioner could be interviewed. (*Id.*). Both parents came with Petitioner to the Sheriff's station and gave their permission for Comstock to interview Petitioner. (*Id.*). Petitioner was 17 years old at the time of the interview. Petitioner's parents were refused permission to be present during the interview (R.T. 9-10).

The interview, conducted exclusively by Comstock, lasted approximately two hours, from 12:30 p.m. to 2:30 p.m. (A.R. 208-68). Comstock did not advise Petitioner he was under arrest. (*Id.*). To the contrary, Comstock appeared to indicate, in the course of the interview, that Petitioner would be allowed to return home after the interview. (*Id.* at 240, 258). Petitioner did return home after the interview (R.T. 501; A.R. 268).

Comstock did not threaten, harass or attempt to deceive Petitioner (A.R. 208-68). She did express disbelief when Petitioner's initial version of events omitted any mention of the crimes (A.R. 227). She did urge Petitioner to tell the truth (A.R. 227-30). She did not advise Petitioner he would have to remain in the Sheriff's station until he told the truth (A.R. 208-68).

DISCUSSION

For the reasons discussed herein, the Petition should be denied and dismissed with prejudice.

Miranda generally bars the prosecution from using statements resulting from custodial interrogation unless the suspect first was advised of his or her constitutional rights.[11/] *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *United States v. Henley*, 984 F.2d 1040, 1043 (9th Cir. 1993). For purposes of *Miranda*, "custody" is a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). The issue of whether a suspect is in custody must be determined by the individual circumstances of the case. *Id.*; *United States v. Eide*, 875 F.2d 1429, 1433 (9th Cir. 1989); *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981). "Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981); *see Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *see also United States v. Erving, L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (standard for evaluating existence of "custody" remains an objective standard, even where the person being questioned is a juvenile). The issue of "custody" presents a mixed question of law and fact. *Thompson v. Keohane*, 516 U.S. 99 (1995).

This Court finds that, under the totality of the circumstances attending Petitioner's interview, a reasonable person would have concluded he would be free to leave. Thus, this Court concludes Petitioner was not "in custody" during the interview. In *United States v. J.H.H.*, 22 F.3d 821, 831 (8th Cir. 1994), the Court of Appeals upheld the District Court's determination a fourteen-year-old boy was not "in custody" during a police station interview. In *J.H.H.*, as in the present case, the juvenile was questioned by only one officer, was not

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11. Respondent argues that a 1968 Congressional enactment overruled *Miranda*. The United States Supreme Court recently rejected this argument. *See Dickerson v. United States*, 2000 WL 807223 (U.S. June 26, 2000).

threatened or deceived and was not placed under arrest at the termination of the interview. *Id.* The juvenile in *J.H.H.* was told that the questioning was voluntary, that he was not under arrest and that he was free to leave at any time. *Id.* Comstock did not give Petitioner such explicit reassurances. However, Petitioner was not informed he was under arrest and did receive indications he would be free to leave upon the conclusion of the interview. Moreover, even a failure to inform a police station interviewee he or she would be free to leave does not necessarily control the custody analysis. *Davis v. Allsbrooks*, 778 F.2d 168, 171-72 (4th Cir. 1985).

Petitioner emphasizes the interview took place at a Sheriff's station. This factor does not mandate a finding of custody. "The Supreme Court consistently had held that, when a suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police after a brief interview, a finding of 'custody' for *Miranda* purposes is unwarranted." *United States v. Jones*, 818 F.2d 1119, 1123 (4th Cir. 1987); *accord California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

Petitioner alleges he knew at the time of the interview he was considered to be a suspect (R.T. 11). This factor does not mandate a finding of custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) ("Nor is the requirement of [*Miranda*] warnings to be imposed simply because . . . the questioned person is one whom the police suspect"); *accord California v. Beheler*, 463 U.S. 1121, 1125 (1983).

Petitioner emphasizes Comstock expressed skepticism regarding Petitioner's initial answers and urged Petitioner to tell the truth. However, Comstock never threatened or attempted to deceive Petitioner. In any event, courts have refused to find custody even where the interrogating officer resorts to trickery and deceit. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (police falsely stated suspect's fingerprints had been found at the scene of the crime); *Bains v. Cambra*, 204 F.3d

964, 968, 973 (9th Cir. 2000) (police falsely stated another individual had implicated the suspect in the crime).

Petitioner invites a comparison to the California Court of Appeal's decision in *People v. Aguilera*, 51 Cal. App. 4th 1151, 59 Cal. Rptr. 2d 587 (1996). The comparison is not apt. The suspect in *Aguilera* was subjected to intense, persistent, aggressive "tag team" interrogation which was, at times, threatening and intimidating. 51 Cal. App. 4th at 1159-60, 1164-65). The suspect in *Aguilera* effectively was told he would not be permitted to leave the police station until he told "the truth." 51 Cal. App. 4th at 1159-60, 1163. The pertinent circumstances of the present case stand in stark contrast to those of *Aguilera*.

Petitioner also invites a comparison to the circumstances found in *Thompson v. Keohane*, 516 U.S. 99 (1995). In *Thompson*, however, the Supreme Court determined only that the issue of "custody" presented a mixed question of law and fact. The Supreme Court did not purport to adjudicate the "custody" issue under the circumstances of that case.[12/]

Finally, the Ninth Circuit's recent decision in *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000), strongly counsels against granting habeas relief in the present case. In *Bains*, a murder suspect was questioned for hours by several officers at a police station. The officers attempted to deceive the suspect by falsely telling the suspect that a witness had implicated him. The Ninth Circuit nevertheless concluded:

> "There is no evidence here to suggest that, under clearly established federal law, a reasonable person in Bains's situation would have felt that he was not free to terminate the police interrogation . . . At the very

12. Indeed, the Ninth Circuit determined on remand that the petitioner in *Thompson* had not been in "custody" during his interrogation. *Thompson v. Keohane*, 145 F.3d 1341, 1998 WL 230928 (9th Cir. 1998) (unpublished opinion, cited only to show that law of that case), *cert. denied*, 525 U.S. 1158 (1999).

> least, the state courts' (i.e., the trial court's and the California Supreme Court's) determinations that no *Miranda* violation occurred until after Bains first had made his requests [to speak with a lawyer, with his wife and to leave the police station], cannot be said to have been so erroneous that they can be said to have resulted 'in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 973.

The same conclusion obtains in the present case. At a minimum, the state courts' *Miranda* rulings were not "so erroneous that they can be said to have resulted" in a decision "contrary to" or involving "an unreasonable application of" "clearly established Federal law, as determined by the Supreme Court of the United States." *See also Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000) (state court decision must constitute "clear error" to warrant habeas relief under the AEDPA).

CONCLUSION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.[13/]

DATED: July 5, 2000.

s/_____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

13. The Court need not determine whether all aspects of Petitioner's *Miranda* claim have been exhausted. Courts may deny unexhausted claims on the merits. *See* 28 U.S.C. § 2254(b)(2).

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

FILED
AUG 8 2000
ENTERED
AUG 22 2000

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALVARADO, Petitioner,	)	NO. ED CV 00-326-VAP(E)
v.	)	ORDER ADOPTING FINDINGS, CONCLUSIONS AND
R.Q. HICKMAN, Acting Warden of Mule Creek State Prison, Respondent.	)	RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 8, 2000.

s/_____
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

FILED
AUG 8 2000
ENTERED
AUG 22 2000

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALVARADO,	)	NO. ED CV 00-326-VAP(E)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	
	)	
R.Q. HICKMAN, Acting Warden of Mule Creek State Prison,	)	
	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: August 8, 2000.

s/_____
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
SEP 13 1999

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent,	B114847
v.	(Super. Ct. No. VA035109)
PAUL R. SOTO et al. Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Soto.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant Alvarado.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Beverly K. Falk, Deputy Attorney General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Factual and Procedural Summary and parts I, II, III, IV, V, VII & VIII.

Paul R. Soto and Michael Alvarado appeal from their judgments of conviction by jury trial of murder (Pen. Code, § 187)[1] and attempted robbery (§ 664/211).

In the published portion of this opinion, we consider Alvarado's argument that the trial court erred in refusing to reduce his first degree murder conviction to manslaughter. We conclude that since there is no basis in the evidence to justify a reduction of Alvarado's conviction to manslaughter, the trial court did not err in denying Alvarado's request. We also conclude that, while the evidence establishes that Alvarado committed first degree felony murder, rather than second degree murder, he cannot complain of error in the second degree murder conviction and sentence since any error was favorable to him.

In the unpublished portion of this opinion, we address the other arguments raised in the appeal. Soto argues that police officers persisted in questioning him after he had asked for an attorney, in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (hereafter *Miranda*). We conclude that Soto's invocation of his right to counsel was equivocal and find no violation of his rights. Soto also argues the trial court erred in denying his requested instructions to inform the jury that Manuel Rivera and Valerie Garcia were accomplices, and consequently, that their testimony had to be corroborated by another witness. These two witnesses were accessories after the fact, but not accomplices. The trial court was not required to give the accomplice instruction. Soto and Alvarado argue the prosecutor committed misconduct by displaying a large weapon in front of the jury, although it was not proved to be the murder weapon. We conclude that the rulings by the trial court and its admonition to the jury on this subject were adequate. We find no basis to reverse Soto's conviction.

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1. All statutory references are to the Penal Code unless otherwise indicated.

Alvarado argues that his punishment is constitutionally excessive. We conclude that it is not. He also raises a *Miranda* issue. He contends that he was subjected to custodial interrogation, but was not given the requisite admonitions of his rights. We conclude that the interrogation was not custodial, and hence that the officers were not obligated to admonish Alvarado of his rights. Alvarado challenges the sufficiency of the evidence to prove that he aided and abetted Soto. We find ample evidence that he was an aider and abettor. Alvarado made three *Wheeler*[2] motions on the grounds that the prosecutor used peremptory challenges based on suspect classifications. We find no error in the trial court's rulings rejecting these motions.

FACTUAL AND PROCEDURAL SUMMARY

On the night of September 22, 1995, Soto, Alvarado, and others gathered at the home of Manuel Rivera in Santa Fe Springs. Rivera's house was adjacent to a shopping mall. During the evening the group drank various alcoholic beverages and some persons smoked marijuana. After midnight, a group including Rivera, Alvarado, Soto, and Valerie Garcia, went to the adjacent mall to use pay telephones. They saw an older truck driven by an older man (later identified as Francisco Castaneda) enter the parking lot. Garcia approached the truck and got one dollar from the driver.

Mr. Castaneda drove to a nearby dumpster and began removing cardboard from the dumpster. Soto said "Let's Jack." Rivera understood that Soto meant that he intended to steal the truck. At this time, Alvarado was in the donut shop. When Alvarado returned to the group, Soto again said "Let's Jack." Soto and appellant approached the truck. Soto walked to the driver's side of the truck. Mr. Castaneda was between the dumpster and the driver's side of the truck. Alvarado walked toward the passenger door of the truck. A gunshot, followed by

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2. *People v. Wheeler* (1978) 22 Cal.3d 258, hereafter *Wheeler*.

a scream were heard. Everyone, including Soto and Alvarado, ran back to Rivera's house.

Soto had blood on his shirt when he returned to Rivera's house. He went into Rivera's bedroom first and then into the bathroom to clean up. Soto left a black, long-barreled gun in Rivera's room. Soto told Rivera he had shot the driver of the truck when the man resisted his demand for money and the keys to the truck. Soto also warned Rivera and Alvarado to remain quiet about what had occurred. Rivera and Alvarado hid the gun in a park.

A deputy sheriff from the Norwalk station responded to a call from the shopping mall and found Francisco Castaneda dead from a bullet wound. The evidence indicated that he was shot at close range with a large caliber gun.

Rivera was granted immunity from prosecution in return for his testimony. Alvarado was interviewed by the police on October 24, 1995. (We reserve the details of the interview for our discussion of Alvarado's *Miranda* argument.) The jury heard excerpts from the interview in which Alvarado said he knew that Soto was going to rob the man and take his truck so they could get home from Rivera's place.

The prosecution also played a taped interview of Soto to the jury. In that interview, Soto said he was drunk on the night of the shooting and that the gun had fired accidentally.

The defense focused on inconsistencies in Rivera's testimony. Alvarado testified in his own defense. He denied an intent to kill Mr. Castaneda, and said he had not talked with the victim, nor made any demands. He did not have either a gun or bullets that night. He had no idea what was going on and did not encourage Soto. Soto did not testify.

Soto was found guilty of first degree murder, with the use of a gun, committed during the attempt to commit second degree robbery. He was sentenced to a term of life in prison without possibility of parole, plus four years for the firearm use. Sentence on the second count, of attempted robbery, was stayed under section 654. Soto filed a timely appeal.

Alvarado also was convicted of one count of first degree murder and one count of attempted robbery. The jury found the allegations that a principal was armed with a firearm in the commission of these offenses to be true. On Alvarado's motion, the court reduced the conviction to second degree murder. The court also granted Alvarado's request for a pre-sentence diagnostic study under section 1203.03. After considering the study, the trial court denied probation and sentenced Alvarado to a term of 15 years to life for second degree murder. It also stayed the sentence on the robbery and on the armed principal enhancement. Alvarado filed a timely appeal.

DISCUSSION

I

Soto argues that his statements to the police should have been excluded because the officers continued to question him after he had invoked his right to have counsel present under *Miranda*. Respondent asserts that the request for counsel was ambiguous, and that the officers were not obligated to ask clarifying questions.

Soto was interviewed about the murder of Mr. Castaneda at the Norwalk Sheriff's station on November 30, 1995. He was advised of, and waived, his constitutional rights under *Miranda*. After 30 to 35 minutes of questioning, one of the detectives told Soto that the officers knew what had occurred, and that the interview was his opportunity to tell his side. Soto replied: "I'll just wait till–till I go to court I guess and talk to my attorney you know." Detective Comstock replied: "Well that's entirely up to you." Detective Lee said: "You fell [*sic*] your attorney knows the truth and you don't?" Soto replied: "No." At that point, the interview continued, Soto made no further requests for counsel, and responded to the officers' questions.

"If a suspect indicates 'in any manner and *at any stage of the process,' prior to* or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 128-129, emphasis in original.) The *Crittenden* court applied the federal standard announced in *Davis v. United States* (1994) 512 U.S. 452. In *Davis*, the Supreme Court concluded that the statement: "Maybe I should talk to a lawyer" was not a request for counsel. (512 U.S. at p. 462.) The *Davis* court declined to require law enforcement officers to cease questioning immediately if an individual made an ambiguous or equivocal reference to an attorney. (*Ibid.*) The *Crittenden* court also noted that the Supreme Court in *Davis* held that police may seek clarification of an individual's ambiguous reference to counsel, but are not required to do so. (9 Cal.4th at p. 130, fn. 7.)

We are satisfied on the record before us that Soto's reference to counsel was ambiguous and that the officers were not required to stop the questioning at that point. After the officers reaffirmed that Soto could choose to stop the interview until his counsel was present, Soto chose to continue talking. We find no violation of his rights requiring the suppression of his statements.

II

Soto also argues the trial court erred in refusing his request to give the standard jury instructions on accomplice testimony (CALJIC Nos. 3.10-3.13, 3.16, 3.18-3.19). He takes the position that Manuel Rivera was an accomplice whose testimony was to be viewed with distrust by the jury. The prosecutor argued that Rivera was not an accomplice but an accessory after the fact. The trial court refused the proffered instructions.

"An accomplice is a person 'who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'

(§ 1111; *People v. Miranda* (1987) 44 Cal.3d 57, 99 [241 Cal.Rptr. 594, 744 P.2d 1127].) In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33). [Citation.] An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator's criminal purpose. (*Id.* at p. 194.) It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. (*Ibid.*; *People v. Beeman* (1984) 35 Cal.3d 547, 556-561 [199 Cal.Rptr. 60, 674 P.2d 1318].) [¶] Accomplice status is a question of fact for the jury unless the evidence permits only a single inference. [Citations.] Defendant must establish the accomplice status of a prosecution witness by a preponderance of the evidence. [Citation.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1227-1228.)

Section 32 defines accessories: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

Here, the evidence was that Rivera was among the group in the parking lot when Soto declared his intention to "jack" the truck and when the shooting occurred. After Soto and Alvarado returned to Rivera's house, Rivera helped hide the gun used by Soto. This evidence is insufficient to establish that Rivera was an accomplice. He was, instead, an accessory after the fact. The trial court did not err in refusing the accomplice instructions as to Rivera.

Soto also argues the trial court had a sua sponte duty to give accomplice instructions as to the testimony of Valerie Garcia. He argues: "The prosecution believed the robbery was intended in the main to secure appellants and others a 'ride,' i.e. the victim's truck, and Valerie Garcia herself said she spent most of the evening paging and calling her boyfriend Peter,

who was supposed to come and get her. . . . It was she who secured the victim's presence at the scene, by waving him down, to ask for spare change. . . . There was an inescapable inference that, either Rivera lied in saying Garcia was in a position to hear and see the robbery and robbery planning, or Garcia lied in saying that she was not. If Garcia lied, this wold [*sic*] be consciousness of guilt evidence that she too, intended to aid and abet a robbery, so she could finally get her ride home. This again raises an inference of accomplice status, which should have been placed before the jury."

Soto failed to establish that Garcia harbored the requisite intent to make her an accomplice, or even an accessory, to the murder. There is no evidence that she intended to lure Mr. Castaneda to Soto when she asked him for a dollar. She obtained the dollar from Mr. Castaneda before Soto made his statements about stealing the truck. The trial court was not required to give the accomplice instructions as to Garcia.

III

Both Soto and Alvarado argue the prosecutor committed misconduct by waving a large black .357 magnum revolver in front of the jury as if it was the murder weapon, sine there was no evidence linking that weapon to the murder. Respondent argues that there was no error and that Soto's failure to timely object bars his argument on appeal.

During Rivera's testimony, the prosecutor showed him a gun and asked him if it looked familiar. Rivera said that it did, because "it looks like the gun that we hid." The prosecutor asked: "When you say the gun that you hid or 'we hid,' is this the gun that Paul Soto took from your house that you accompanied him along with Mike Alvarado?" Rivera said "Yes."

We agree with respondent that this testimony was sufficient identification of the gun to permit the prosecutor to ask other witnesses about the gun. The prosecutor later called Los Angeles County Sheriff's Sergeant Bruce Harris as an

expert witness who had examined the gun. Sergeant Harris testified that the gun was a double-action Smith and Wesson model 27 .357 Magnum revolver which required three and one-quarter pounds of pressure on the trigger to fire in the single action mode and twelve and one-half pounds of pressure to fire in the double action mode. Counsel for Soto did not object to this testimony.

At the close of the People's case-in-chief, counsel for Soto made his first objection to the introduction of the gun: "There's no linkage to this case. Appeared we have somebody who said that looks like the gun, that's it." The prosecutor conceded the point: "Mr. Bernstein's characterization, I believe, would be correct. Mr. Rivera was the only witness that testified, and I believe he stated that it appeared or looked like the gun he observed Mr. Soto having after the shooting. At this time, the People would withdraw People's 3 at this time . . . ."

After the People rested, counsel for Soto moved for a mistrial: "The jury has seen exhibit 3. It's been brandished extensively in court. . . . It's a large, black revolver. Looks at me at least a six-inch barrel. Overall length is a minimum of a foot. It's been displayed quite prominently. At this point, it has nothing to do with this case. I think it has to have some prejudicial effect . . . ." Counsel for Alvarado joined in the motion.

The trial court noted that there had ben testimony about a gunshot from a large caliber gun comparable to a .357 or a .38. The trial court denied the motions.

The trial court denied several efforts by the prosecutor to provide additional testimony about the gun. She was not allowed to question Desmond Pacheco, who had been in the group with appellants in the parking lot, about his statement regarding what happened to a gun. She was not allowed to question Alvarado about a Roland Macias, who apparently was arrested with gun marked as exhibit 3. After counsel for the defense objected, the trial court denied the prosecutor's attempt to call Pacheco as a rebuttal witness to testify that he and Macias had gone to Rivera's house, but found no one home.

The trial court also denied the prosecutor's effort to call a deputy sheriff to testify that Macias possessed the gun after the murder.

The prosecutor was allowed to question Alvarado about the gun Soto used in the murder. Alvarado was unable to identify the gun marked as exhibit 3 as the gun used in the murder or as the gun he helped hide in the park.

After the defense rested, the prosecutor moved to strike Sergeant Harris' testimony because of the trial court's rulings on the proposed rebuttal witnesses, and also asked that the jury be admonished not to consider that testimony. Counsel for Soto had no objection to this proposal. Counsel for Alvarado suggested a further admonition: "[T]he gun will not go into evidence. There's no evidence it was ever used in this crime. Therefore, that's why we are striking testimony. That exhibit will not be presented to them."

At the point, counsel for Soto renewed his motion for mistrial because the prosecutor had shown the gun to Alvarado on cross-examination, knowing that there was no link between the gun and the murder of Mr. Castaneda. Counsel for Soto agreed that Sergeant Harris' testimony should be stricken, but argued that the jury had heard a large amount of cumulative, irrelevant and prejudicial information. Counsel for Alvarado joined in the motion. The trial court denied the motion, observing, "On balance, I don't think it's that prejudicial. I don't think it was prejudicial at all, especially since I'm going to give a cautionary instruction."

At the beginning of the instructions to the jury, the trial court said: "You took notes in this case and took notes of each of the witnesses who testified. There's also reference made to exhibits coming in. Well, the gun that was People's exhibit 3, I believe, is not coming into evidence. That is not being admitted; therefore, the testimony of Detective Harris who took the stand, that testimony will be stricken by the court. [¶] It applied only to that particular gun so since the gun is out, the testimony has to got out also." There was no objection by counsel for appellants.

We find no error. "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citations.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) We are satisfied that the order striking Sergeant Harris' testimony and the admonition to the jury were sufficient to avoid prejudice to appellants. If they found the admonition given to the jury unsatisfactory, it was their obligation to seek a further admonition.

IV

Alvarado argues that his statements to the police should have been excluded. He contends that he was subjected to custodial interrogation without being advised of his *Miranda* rights, and that he did not waive these rights.

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry"; '[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry, all agree, is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a "mixed question of law and fact" . . . .' [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding "'basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .'"" [Citation.] Having

determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

In *Ochoa*, the defendant signed a statement that he voluntarily submitted to a polygraph examination. That fact weighed heavily in the Supreme Court's conclusion that he was not subjected to a custodial interrogation because a reasonable person under the same circumstances would have understood that he or she was free to leave. (19 Cal.4th at pp. 402-403.) The court distinguished a case cited here by Alvarado, *People v. Aguilera* (1996) 51 Cal.App.4th 1151, in which the Court of Appeal reversed a conviction because of a *Miranda* violation: "[I]n *Aguilera*, the court found that a reasonable individual would experience a degree of restraint 'normally associated with a formal arrest' (*Id.* at p. 1161) in part because the police, as the court emphasized with italics, told the defendant that "'[*w*]*e're not gonna let you leave* here until we go talk to the girl, and she's not gonna be able to confirm the story . . . .'" [Citations.] Nor does *Aguilera* say that the defendant in that case was given and signed a formal advisement that the questioning was voluntary–rather, an officer merely informed him that he was not in custody [citation]. Without either approving or disapproving *Aguilera's* compilation of circumstances that in its view tend to prove or disprove custody (*id.* at p. 1162), we find certain facts in that case notably unlike the facts of this one." (19 Cal.4th at p. 403.)

Here, the transcript of the interview of Alvarado by Detective Cheryl Comstock establishes that the detective had left word at Alvarado's house that she needed to speak with him. Detective Comstock also contacted Alvarado's mother at her work. Mrs. Alvarado told Detective Comstock that her husband was bringing Alvarado to the Pico Rivera Sheriff's station so he could be interviewed. Both Mr. and Mrs. Alvarado came to the Sheriff's station with their son. They had given permission to Detective Comstock to interview him.

Alvarado was not given a statement to sign to the effect that he had voluntarily participated in the interview, nor was he advised of his *Miranda* rights. The interview lasted approximately two hours, from 12:30 p.m. to 2:30 p.m.

During the first part of the interview, Alvarado gave an account of his activities on the night of the murder, but omitted any reference to the shooting or disposal of the gun. He admitted drinking. Detective Comstock said: "Okay, we did real good up until this point and everything you've said it's pretty accurate till [*sic*] this point, except for you left out the shooting." Alvarado asked: "The shooting?" Detective Comstock repeated: "Uh huh, the shooting." Alvarado said: "Well I had never seen no shooting." Detective Comstock responded: "Well I'm afraid you did." Alvarado repeated his statement that he had seen no shooting. Detective Comstock informed Alvarado that she had witnesses who said "quite the opposite."

She told Alvarado: "So why don't you take a big breath, like I told you before, the very best thing just to be honest. I don't have three notebooks full of notes because I haven't been talking to people and there's no way you could have this many people involved in something like that and people making deliveries did uh, the delivery trucks making deliveries, people sitting in donut shops doing things and your group and everybody is not going to lie about this, okay? You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is . . . that they have tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way far fetched different."

Alvarado said that he knew where the shooting occurred, but did not remember seeing it. Detective Comstock told him that she knew Alvarado had gone up to the passenger side of Mr. Castaneda's truck. She said: ". . . I don't think it was your

intention at all for that man to get killed. I think that was the last thing you thought was going to happen. When it did happen, it was like, oh shoot. I want to get out of here. As a matter of fact I'm so certain that you didn't want anything to happen when you went up to truck. You were kind of ducking behind the truck on that side, hiding 'cause you didn't really want to be up there, but you were. I think maybe you weren't thinking clearly. I think maybe you made some bad decisions 'cause you weren't thinking clearly that night and I know that's not what you intended to happen, by any means, 'cause you don't seem like that kind of a man."

Detective Comstock then questioned Alvarado about how much he had to drink and how impaired he was as a result. When Alvarado said that he had not seen what happened on the other side of the truck, Detective Comstock told him that he had to make some very tough decisions about being honest and taking care of himself, and that the people who shot Mr. Castaneda were not his friends because they had put him in a bad position. She emphasized that Alvarado did not owe anything to the shooter.

When Alvarado admitted that he had been at the truck, but refused to identify the shooter, Detective Comstock pressed him about the reason for his reluctance. Finally, Alvarado said it was because the shooter was from a gang different from his own. After some further discussion about the fact that this was not a gang shooting because the victim was not a member of a gang, Alvarado began giving further details of the crime, including his role in hiding the gun after the murder. Eventually, he identified Soto as the shooter.

Near the end of the interview, Detective Comstock commented, "You know I keep hearing your pager beep, do you need to use the phone or –" Alvarado interrupted and said no. Detective Comstock offered Alvarado the use of a telephone to make a call. Again, Alvarado said he did not need it. Detective Comstock said: "Okay. And we should be done here pretty quick. I'll get you out of here, so you can go about your activities." Shortly thereafter, Detective Comstock offered

Alvarado an opportunity to take a bathroom break or water break, but he said it was not necessary. Detective Comstock said: "Okay. If you do, just say so and we'll stop." A short time later the interview was concluded.

Detective Comstock took Alvarado out to his parents in the lobby of the station, advised them what had happened, and sent Alvarado home. In December 1995, the decision was made to charge Alvarado with the murder of Mr. Castaneda. Detective Comstock called his parents, told them a warrant had been issued for Alvarado's arrest, and arranged for them to turn him in at the station.

Alvarado relies heavily upon *People v. Aguilera, supra*, 51 Cal.App.4th 1151. It is distinguishable. In *Aguilera*, police officers went to the defendant's residence and told him and his mother that they wanted to interview him at the station. Both agreed to the interview. The defendant was taken to the police station by the officers. The interview, conducted in an interview room, lasted two hours. One officer told the defendant he was not in custody. But she then said they would take him home when they were finishing saying: "'[i]t really depends on how, how long you want to take and how, how quickly you tell us the truth.'" (*id.* at p. 1159.)

When the defendant denied involvement in the shooting, the officers rejected his version of events, accused him of fabricating an alibi with another suspect, told him not to "play games," confronted him repeatedly with incriminating evidence of his involvement with gangbangers, and falsely suggested they had his fingerprints from one of the cars involved in the incident. When the defendant maintained his innocence, the officers intensified their pressure, and "assailed him for hiding behind lies and not taking responsibility for his conduct." (*People v. Aguilera, supra,* 51 Cal.App.4th at p. 1159.) The defendant was warned that lies would not protect him and the truth might exculpate him. The officers also told him other police officers were with his mother, who would not corroborate his story, asked him to think about family events

and opportunities he would miss if sent to prison, and said he owed the victim the real story.

As the defendant persisted in his version of the events, the officers again strongly warned him of the negative consequences of lying to them. After further pressure from the officers, the defendant eventually partially abandoned his story. One of the officers told him: "'[Y]ou know [how] this is gonna work. You're gonna tell us some girl's name. *We're not gonna let you leave* here until we go talk to the girl, and she's not gonna be able to confirm the story, Joe.'" (*People v. Aguilera, supra*, 51 Cal.App.4th at p. 1160, emphasis in original.) At that point, the defendant dropped all resistance, explaining what had happened on the day of the shooting.

The *Aguilera* court concluded that the interrogation was custodial and that *Miranda* rights should have been given. It found significance in the officer's warning that the interview would end after he told the truth. Based on the officers' repeated rejections of the account given by the defendant, the *Aguilera* court concluded "a reasonable person eventually would have realized that telling the 'truth' meant admitting the officers' information was correct and explaining how and why one was involved and that until this 'truth' came out, he or she could not leave. The officers later expressly reinforced this implication by explicitly telling defendant he would *not* be allowed to leave if they had to go interview an alleged alibi witness." (51 Cal.App.4th at p. 1163.) The court also noted that the defendant was not told he was free to leave.

In reversing the conviction, the *Aguilera* court also emphasized that the "'tag team' interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how defendant's interrogation might have differed had he been under arrest." (51 Cal.App.4th at pp. 1164-1165.)

The interview of Alvarado was quite different. He was not told he could not leave until he told the truth, and was not subjected to the intense and aggressive tactics employed by the officers in *Aguilera*. Although the officers made it clear to Alvarado that they disbelieved his early, exculpatory, version of events on the night of the murder, they did not fabricate evidence or subject him to the intense pressure used by the officers in *Aguilera*. We are satisfied that a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave. The interrogation was not custodial and no *Miranda* warnings were required. The trial court did not err in admitting the statements Alvarado made during the interview.

V

Alvarado argued there was insufficient evidence to support his conviction as an aider and abettor of the attempted robbery committed by Soto.

"When reviewing the sufficiency of the evidence underlying the conviction, our inquiry is limited whether any rational trier of fact could have found the necessary elements of the crime beyond a reasonable doubt. [Citation.] We review the record in its entirely when making that determination, viewing the evidence in the light most favorable to the prosecution. [Citations.] In other words, '. . . the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence–that is, evidence which is reasonable, credible, and for a solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] Thus, we "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citations.]" (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

The Supreme Court recently examined the principles establishing aider and abettor liability. In *People v. Mendoza* (1998) 18 Cal.4th 1114 the court said: "The actual perpetrator must have whatever mental state is required for each crime charged, here shooting at an inhabited building, murder, and attempted murder. An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.] Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]" (*Id.* at p. 1123.)

Alvarado testified at trial that he knew Soto wanted Mr. Castaneda's truck. The prosecutor asked: "You didn't know what you were thinking, but you went over there. And you had no intention of hurting him, but you walked over to the side of the truck also, correct?" Alvarado responded: "Yes." He was impeached with portions of his statement to Detective Comstock, which were played to the jury. Alvarado admitted telling Detective Comstock that he had heard Soto suggest taking the truck.

The jury also heard a portion of Alvarado's statement in which he said that Soto had asked who would go with him to get the truck and that Alvarado went to the passenger side and Soto to the driver's side. Alvarado admitted that he saw that Soto was armed with a gun before Soto walked toward the truck.

This evidence is sufficient to establish that Alvarado went to the truck with Soto with the intention of helping Soto to steal the truck.

VI

Alvarado argues that his sentence is disproportionate to his level of culpability and must be reduced further to manslaughter. On his motion, the trial court reduced his conviction from first degree murder to second degree murder. But Alvarado contends that the trial court erred in concluding that it lacked the authority to reduce it further to manslaughter.

After his conviction, Alvarado moved to have his sentence reduced under *People v. Dillon* (1983) 34 Cal.3d 441. At the hearing on the motion, the trial court said that it was familiar with *Dillon* and its progeny, but could find no case allowing reduction from first degree murder to manslaughter. The prosecutor supported reduction of the offense to second degree murder. The trial court reduced the conviction to second degree murder.

In *Dillon*, the Supreme Court reduced a conviction for first degree felony murder to second degree murder because, in its view, the sentence for the former was excessive and a constituted cruel or unusual punishment. (34 Cal.3d at p. 489.) "Successful challenges based on proportionality are extremely rare. [Citation.] The defendant must show the sentence is '"out of all proportion to the offense"' and that it offends 'fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424 [105 Cal.Rptr. 217, 503 P.2 921], fn. omitted.)" (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

Here, the trial court did what the *Dillon* court did: it reduced the offense from first degree felony murder to second degree murder. Justice Mosk, writing for the *Dillon* majority said: "[B]ecause [Dillon] intentionally killed the victim without legally adequate provocation, defendant may and ought to be punished as a second degree murderer." (*Id.* at p. 489.) Unlike appellant, who was merely an aider and abettor, Dillon personally killed the victim. The Supreme Court found that Dillon acted with an intent to kill consistent with second degree murder, and reduced the offense accordingly.

Appellant argues that the trial court expressed a desire to further reduce his conviction and that it erred in concluding it had no discretion to do so.

The problem with appellant's argument is that his conduct did not constitute manslaughter. Manslaughter is defined in section 192 as "the unlawful killing of a human being without malice. It is of three kinds: [¶] (a) Voluntary–upon a sudden quarrel or heat of passion. [¶] (b) Involuntary–in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . ." In our case, as in *Dillon*, the evidence at trial established that there was no provocation for the homicide, making voluntary manslaughter inapplicable. The crime was not involuntary manslaughter because the homicide was not the result of a lawful act performed unlawfully or with criminal negligence, nor was it the product of an unlawful act not amounting to a felony. In sum, the evidence did not support a reduction to either form of manslaughter.

Neither was the crime second degree murder. The victim was killed during the attempted commission of a robbery. Under section 189, a murder in the attempted commission of a robbery is of the first degree. But appellant cannot be heard to complain over an error favorable to him. In *People v. Powell* (1949) 34 Cal.2d 196, the defendant was charged with performing an abortion on a patient which resulted in her death. That offense was second degree murder. The trial court, sitting without a jury, found Powell guilty of manslaughter. On appeal, Powell argued that the trial court did not have power to find him guilty of manslaughter, and that he was guilty of second degree murder or of no crime at all.

The Supreme Court disagreed: "It cannot be doubted that a trier of fact has and often exercises the *power*, because of obvious extralegal factors or for no apparent reason, to find a defendant guilty of a lesser degree or class of crime than that shown by the evidence. [¶] Furthermore, even if it be assumed that the trier of fact erred here when he found defendant guilty

only of manslaughter, defendant cannot invoke reversal on an error which is favorable to him. [Citations.] An appellant is precluded from complaining that he was convicted of a lesser offense than the one of which he is guilty according to undisputed evidence, . . . [Citations.]" (*Id.* at pp. 205-206, emphasis in original; emphasis in original; see also *People v. Lee* (1999) 20 Cal.4th 47, 64-65 [defendant cannot appeal error in conviction of voluntary manslaughter where evidence supports conviction of second degree murder].)

Under these circumstances, we conclude that the trial court was correct in ruling that it had no basis to further reduce appellant's conviction and sentence to manslaughter. We turn to Alvarado's argument that his sentence constitutes cruel or unusual punishment.

VII

"To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' (*ibid.*), or, stated another way, that the punishment ""shocks the conscience and offends fundamental notions of human dignity"" [citation], the court must invalidate the sentence as unconstitutional." (*People v. Hines* (1997) 15 Cal.4th 997, 1078.)

Alvarado argues that the sentence of 15 years to life is disproportionate to what he describes as minimal involvement in the murder. He points out that he will have to serve a minimum of 12 years of this sentence before he is eligible for parole under section 2933.1. He also claims that his time in

prison will be particularly difficult, citing attacks he suffered while incarcerated in the Los Angeles County jail.

He contrasts his culpability with the defendants in a number of cases that upheld lengthy sentences for aiders and abettors in felony murders: *People v. Ortiz* (1997) 57 Cal.App.4th 480, *People v. Mora* (1995) 39 Cal.App.4th 607, *People v. Birden* (1986) 179 Cal.App.3d 1020, and others. While Alvarado may not have been as active a participant as those in the felony-murder cases he cites, he aided and abetted robbery-murder in this case. In what turned out to be a tragic mistake, Alvarado chose to accompany Soto, knowing that Soto intended to steal the truck and that he was armed with a gun. Alvarado went to the passenger side of the truck and stood there while Soto shot the victim. He then hid the murder weapon, and the following day, led Soto's friends to its hiding place so they could dispose of it.

The probation report reveals that Alvarado has had a drug problem since junior high school, using marijuana, LSD, and methamphetamine. He also drinks a six-pack of beer two to three days a week and drinks more on weekends. He is a member of the Pico Rivera Street gang, but the murder was not gang related. He had no prior criminal history as a juvenile. The trial court received numerous letters and the testimony of witnesses seeking leniency for Alvarado.

Soto, the shooter here, was given a sentence of life in prison without the possibility of parole. As we have discussed, Alvarado's conviction was reduced to second degree murder and he was given a sentence of 15 years to life. Under these circumstances, we cannot say that the punishment shocks the conscience and offends fundamental notions of human dignity.

VIII

Finally, Alvarado argues the trial court erred in denying *Wheeler* motions challenging the prosecutor's peremptory challenges of three prospective jurors. Alvarado either joined

in Soto's *Wheeler* motion or made his own as to each juror in question.

"A party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*Wheeler, supra*, 22 Cal.3d at p. 276.) In *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712], the United States Supreme Court held that peremptory challenges based solely on race also violated the federal equal protection clause when the defendant is a member of the race being challenged. Although *Batson* has no application in this case, the high court has recently extended the *Batson* holding and given a defendant, regardless of race, standing to object to the racially discriminatory use of peremptory challenges. (*Powers v. Ohio* (1991) [449 U.S. 400] [113 L.Ed.2d 411, 111 S.Ct. 1364].) Under *Wheeler*, of course, which is based on the right to trial by a representative jury, a defendant need not be a member of the group to challenge its exclusion. (*Wheeler, supra*, 22 Cal.3d at p. 281.)" (*People v. Fuentes* (1991) 54 Cal.3d 707, 713-714.)

The procedure for a *Wheeler* challenge is well established. "If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias. (*Wheeler, supra*, 22 Cal.3d at p. 280.) To establish a prima facie case, the moving party should first make as complete a record as possible; second, the moving party must establish that the persons excluded are members of a cognizable group; and third, the moving party must show a strong likelihood that the persons are being excluded because of group association. [Citations.] Once the moving party has established a prima facie case, the burden shifts to the other party to come forward with a race-neutral explanation related to the particular case to be tried. [Citations.]" (*People v. Fuentes, supra*, 54 Cal.3d at p. 714.)

We apply the substantial evidence standard in reviewing a trial court's ruling on a *Wheeler* motion. (*People v. Jones* (1998) 17 Cal.4th 279, 293.) If the trial court has not found a prima facie case of group bias, we review the entire record for evidence to support the trial court's ruling. (*People v. Buckley* (1997) 53 Cal.App.4th 658, 665, citing *People v. Howard* (1992) 1 Cal.4th 1132, 1155.) We affirm if the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*Ibid.*) We follow the Supreme Court's decision and accord the great deference to the trial court's ruling on *Wheeler* motions because the trial court's determinations largely turn on an evaluation of credibility. (*People v. Fuentes, supra*, 54 Cal.3d at p. 714.)

The first *Wheeler* motion came when the prosecutor had exercised a peremptory challenge to excuse prospective juror number 3492.[3] PJ 3492 had no prior jury experience, was married to a "plant lady" and had children who worked for his wife. He was a cabinet maker, and had a daughter who was a secretary to a church. He was Hispanic. When asked if he felt comfortable with this being his first case as a juror, PJ 3492 replied "No."

The motion made by counsel for Soto, joined by counsel for Alvarado. Counsel for Soto said: "The last juror that was excused is Hispanic in origin, as is my client. My notes indicate no justifiable reason, a side [*sic*] from his racial origin, that I'm aware of for his excusal." The prosecutor replied that the fact that Soto is Hispanic was not significant because the victim was also Hispanic. The trial court observed that most prospective jurors in the courthouse are Hispanic. The prosecutor said that PJ 3492 "was sleeping at one point, had his eyes closed while the judge was going through some of the questions." The trial court said it did not find a prima facie case and denied the motion.

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3. We refer to prospective juror by their number, for example, PJ 3492.

Alvarado argues the trial court failed to evaluate the reasons given by the prosecutor for exercising her peremptory challenges. But defense counsel failed to offer any evidence showing a strong likelihood that PJ 3492 was excluded because he was Hispanic, other than the bare assertion that this was the case. This is insufficient to establish a prima facie case. (See *People v. Buckley, supra*, 53 Cal.App.4th at pp. 665-666.) Even if we were to find a prima facie case was made, the fact that the prosecutor believed the juror to be sleeping during voir dire was a sufficient race neutral ground for challenging him.

The second *Wheeler* motion was made after the prosecutor exercised her peremptory challenges to excuse two additional Hispanic prospective jurors: PJ 6300 and PJ 4379. Counsel for Soto, joined by counsel for Alvarado, asserted that there was a pattern of excusing Hispanic jurors and that there was no other rationale to justify excusing them. The court and counsel agreed that the prosecutor had exercised two-thirds of her challenges on Hispanic prospective jurors.

The trial judge said that he was trying to determine whether a prima facie case had been made. He asked if the prosecutor wished to respond. She said that PJ 6300 was unable to recall the employment status of one of her five adult children. The prosecutor explained: "My concern is her ability to remember basic things. Part of the whole process of a jury trial is to listen and recall the evidence and be able to deliberate in a reasonable manner. My concern is she would not be able to do it."

With respect to PJ 4379, the prosecutor said: "Regarding the preemptory [*sic*] with regards to 4379 seated as juror 12, she had no prior jury experience. What the people are concerned about is this morning, in particular, she seemed to be looking over at -- staring more at the defendants and defense side of table. She never made eye contact with the People. [¶] Based on her body language, the fact she has no prior jury service, watching her looking at the defendants, more in the direction of the defendants, the People made, in its discretion, the choice to excuse her." After defense counsel pointed out that there were

only two Hispanics on the panel and none left in the pool of prospective jurors, the trial court found no prima facie case had been made and denied the motion.

Again, the trial court was justified in concluding defense counsel had failed to make a prima facie case. Moreover, PJ 6300's memory problem and PJ 4379's demeanor were race neutral grounds to excuse them.

Counsel for Alvarado made a third *Wheeler* motion when the prosecutor removed the only two African American prospective jurors in the pool, PJ 5995 and PJ 0936. Without expressly finding that a prima facie case had not been shown, the court asked the prosecutor to respond. The prosecutor said that she excused PJ 5595 because her ex-spouse was a Los Angles police officer and that they had been divorced only one year. The prosecutor said that she would be calling law enforcement officers in her case. With respect to PJ 0836, the prosecutor said that she was excused because she had prior jury service on a jury which was unable to reach a verdict on a weapons charge where the weapon at issue was never found. The court did not indicate whether it had found a prima facie case, but denied the motion.

Assuming that a prima facie case was found (*People v. Arias* (1996) 13 Cal.4th 92, 135), we are satisfied that the reasons given by the prosecutor for excusing PJ 5995 and PJ 0836 were sufficient. We find no error.

DISPOSITION

The judgments of conviction are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.
CURRY, J.

Supreme Court, U.S.
FILED
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No. 02-1684

In The

Supreme Court of the United States

MICHAEL YARBOROUGH,
Warden of California State Prison-Los Angeles County,

Petitioner,

v.

MICHAEL ALVARADO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in applying the objective test for a "custody" determination under *Miranda v. Arizona*, 384 U.S. 436 (1966), a court must consider the age and experience of a person if he or she is a juvenile.

2. Whether a state court adjudication can be deemed an "objectively unreasonable" application of clearly established Supreme Court precedent, for purposes of 28 U.S.C. § 2254(d), because it declines to "extend" the rule of a Supreme Court precedent to a new context.

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U.S. Const. Amend. V 7

RESPONDENT MICHAEL ALVARADO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner argues that review is warranted in this case because the Ninth Circuit's decision allegedly conflicts with decisions of this Court, has caused a split among the circuit courts of appeals, and has placed a significant burden on law enforcement. Further petitioner argues that the circuit Courts of Appeals are divided over whether a State court adjudication can be deemed "objectively unreasonable" for purposes of 28 U.S.C. § 2254, where the State court declines to "extend" the rule of a Supreme Court precedent to a new context. Petitioner's arguments are meritless. The Ninth Circuit's decision creates no such split, and is not in conflict with this Court or any other circuit Courts of Appeals

In sum, review by this Court is unwarranted because the Ninth Circuit's decision accords with the law of this Court and does not conflict with any United States Courts of Appeals. *See* Sup. Ct. Rule 10.

STATEMENT OF THE CASE

The underlying facts are undisputed and are recited in Petitioner's petition for writ of certiorari on file with this Court. Respondent incorporates by reference petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

A. THE NINTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *MIRANDA* NOR DOES IT CONFLICT WITH THE DECISION OF THE 6TH AND 8TH CIRCUIT COURT OF APPEALS.

Petitioner contends that the Ninth Circuit's decision in this case creates a new standard for an "in custody" determination for the purposes of *Miranda* since it holds that juvenile status is relevant to that determination, either as a factor under the totality of the circumstances test, or by way of modification to the reasonable person standard enunciated in *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Pet. 7; App. A6-A7. The relevant legal principle upon which the Ninth Circuit relied is that juvenile defendants are accorded heightened procedural safeguards commensurate with their age and experience. App. A23. This legal principle is amply supported by Supreme Court precedent. *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948); *see, e.g., Withrow v. Williams*, 507 U.S. 680, 693 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). Petitioner's complaint is that this "new standard" conflicts with this Court's decision in *Berkemer v. McCarty*, 468 U.S. 420 (1984) and has caused a split in the circuits by being "directly inconsistent" with *United States v. Erving L.*, 147 F.3d 1240, 1247-1248 (10th Cir. 1998) and "at least inconsistent" with *United States v. Macklin*, 900 F.2d 948, 949-51 (6th Cir. 1990) and *United States v. J.H.H.*, 22 F.3d 821, 831 (8th Cir. 1994). Pet. 7, 9-10. Petitioner's contentions are meritless for the reasons set forth below.

First, the Ninth Circuit's decision is not inconsistent with this Court's decision in *Berkemer*. In *Berkemer*, a case involving an adult pulled over for a traffic stop, this Court held that "A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. . . . an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant, nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question", quoting *People v. P.*, 21 N.Y.2d 1, 9-10, 286 N.Y.S.2d 225, 232, 233 N.E.2d 255, 260 (1967). *Berkemer*, 468 U.S. at 442 n.35. Petitioner gleans from this language that an objective reasonable man in the suspect's position would not take into account an objective reasonable *juvenile* or the *juvenile's position* as a suspect. *Berkemer* does not conflict with the Ninth Circuit's opinion in this case, it merely does not address it. Moreover, *Berkemer* is consistent here since the Ninth Circuit in fact used the objective reasonable person standard in making its decision. "[An] 'in custody' determination requires an inquiry into whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." ... "After identifying the relevant circumstances, it is simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was 'at liberty to terminate the interrogation and leave.'" App. A7., A26.

Second, petitioner attempts to manufacture inconsistencies with other circuit Courts of Appeals for purposes of getting certiorari granted. However, petitioner's perceived "split in the circuits" on this issue is illusory at best. In the decision petitioner cites, as directly conflicting with the Ninth Circuit, *United States v. Erving L., supra,* 147 F.3d at 1248, the 10th Circuit did employ the objective standard, but modified it (as the Ninth Circuit did in this case), to account for the defendant's status as a minor. ("Given these facts, *a reasonable juvenile* in E.L.'s position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest.") (emphasis added) *Id.* at 1248 citing *Berkemer*, 468 U.S. at 442, 104 S.Ct. 3138. This is consistent with the Ninth Circuit's action in this case.

Petitioner cites two other cases which it purports are "at least inconsistent" with the decision below; however, they are not inconsistent as much as they simply do not address the issue at hand. Pet. 10. In *United States v. Macklin*, 900 F.2d 948, 949-951 (6th Circuit 1990), the 6th Circuit merely restated "the reasonable man in the suspect's position" test enunciated in *Berkemer*, and held that "A reasonable person could not have thought that, by being questioned in front of the person's home in the manner in which [the officers] questioned the defendants, the person was in custody." *Id.* at 951. That case involved an adult mildly retarded man, not a juvenile. In *United States v. J.H.H., supra,* 22 F.3d at 831, a First Amendment case on cross-burning, the 8th Circuit found that none of the district court's findings were clearly erroneous, including the district court's adoption of the magistrate's findings that "J.H.H. was not in custody when he made the statement, and that, even if he was in custody, he made a valid waiver of his Miranda rights." *Id.* at 831. The 8th

Circuit held that under the clearly erroneous standard of review, "J.H.H.'s interview exhibited none of [the] common indicia of police custody: he was informed that the questioning was voluntary, that he was not under arrest, and that he was free to leave at any time . . . " *Id.* at 831. This case is not inconsistent with the Ninth Circuit's decision below just because it does not specifically address the issue at hand.

Petitioner also claims that the decision below creates a significant burden on law enforcement since "law enforcement officers will not be able to determine whether *Miranda* rights should be given to a juvenile unless they can divine the age and experience of the juvenile." Pet. 11. However, as the Ninth Circuit pointed out in its analysis of this issue" "every state court that has addressed this threshold question of how juvenile status affects the 'in custody' analysis has ruled that juvenile status is a factor in the 'in custody' determination." App. A19 n.5, A24 n.8. Thus, law enforcement officers all over the country are already taking a person's juvenile status into account when interrogating and deciding whether to read them their *Miranda* rights.

B. THE CIRCUIT COURTS OF APPEALS ARE NOT DIVIDED OVER WHETHER A STATE COURT ADJUDICATION CAN BE DEEMED "OBJECTIVELY UNREASONABLE" FOR PURPOSES OF 28 U.S.C. § 2254, WHERE THE STATE COURT DECLINES TO "EXTEND" THE RULE OF A SUPREME COURT PRECEDENT TO A NEW CONTEXT SINCE BOTH THE 9TH AND 11TH CIRCUITS AGREE THAT IT CAN.

Petitioner contends that the 11th Circuit decision in *Hawkins v. Alabama*, 318 F.3d 1302 (11th Cir. 2003) is in

conflict with the decision below and thus creates a split in authority. Pet. 12-13. Petitioner's contention is without merit since both decisions agree that extension of a clearly established principle may be required by relevant Supreme Court case law where a state court's decision fails to extend the clearly established legal principle to a new context in a way that is objectively unreasonable. App. A23-24; *See Hawkins v. Alabama*, *supra*, 18 F.3d at 1307 n.3. In *Hawkins*, the 11th circuit agrees that under some circumstances there is no conflict between the AEDPA and requiring state courts to extend Supreme Court rules. *Id.* ("Extend might only mean to apply the *ratio decidendi* of Supreme Court decisions fully and completely (and not in some crabbed way) so that the rule of law covers new and different facts and circumstances – objectively reasonably viewed – are materially or, put differently, substantially the same that were in the mind of the Supreme Court when it laid down the rule.")

Although *Hawkins* apparently disagrees with the Ninth Circuit's action in the case below, the holding in *Hawkins* does not conflict in the idea that Supreme Court precedent *can* be extended in AEDPA cases where it was unreasonable for the state court not to do so. Specifically, the action which the 11th Circuit condemns in n.3, was not undertaken by the Ninth Circuit. The decision below did not widen the Supreme Court's rules to reach new and substantially different circumstances not contemplated by the Supreme Court; instead it merely found that juvenile status is a relevant factor in the totality of the circumstances analysis in determining custody. Indeed, had California considered respondent's juvenile status in its analysis of the custody determination it would not have been "filling a gap for which the Supreme Court had not yet determined the law" but instead would have been applying the *ratio decidendi* of several Supreme Court

decisions fully and completely so that the existing rule of law would logically cover the facts and circumstances of the case below. The reasoning of the Ninth Circuit in "extending" the rule is substantially the same reasoning that was in the mind of the Supreme Court when they laid down the rules regarding how state courts should analyze a juvenile's understanding and waiver of his Fifth Amendment rights (App. A24 citing *Fare v. Michael C.*, *supra*, 442 U.S. at 725; U.S. Const. Amend. V), as well as how they should consider the totality of the circumstances in determining whether a person is in custody for purposes of *Miranda*. App. A22 citing *Thompson*, 516 U.S. at 112; *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Berkemer*, 468 U.S. at 440-42; *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977). The Ninth Circuit extended Supreme Court precedent in a constitutionally logical way within the mandates of the Congress's intent in AEDPA. There is no split in authority.

CONCLUSION

For the foregoing reasons, Michael Alvarado respectfully requests that this Court deny the Petition.

Dated: June 13, 2003

Respectfully submitted,

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NOV 13 2003

No. 02-1684

IN THE

Supreme Court of the United States

MICHAEL YARBOROUGH, Warden,
California State Prison—Los Angeles County,
Petitioner,

vs.

MICHAEL ALVARADO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1) What law governing custody under *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is clearly established under this Court's precedents?

2) Is there a need for a separate "extension" analysis under the "unreasonable application" prong of 28 U. S. C. § 2254(d)(1)?

3) Is a suspect's status as a juvenile so determinative of the *Miranda* custody issue that a finding that a juvenile's interrogation is not custodial can be deemed to be almost *per se* unreasonable under § 2254(d)(1)?

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IN THE

Supreme Court of the United States

MICHAEL YARBOROUGH, Warden,
California State Prison—Los Angeles County,
Petitioner,

vs.

MICHAEL ALVARADO,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

This case involves yet another failure by a federal circuit court to accord a state court opinion the proper deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Ninth Circuit's "failure to extend" analysis distorts its application of the AEDPA by elevating the defendant's juvenile status to the single factor that determined whether his interrogation was custodial. This is contrary to clearly established law governing *Miranda* custody and subverts the protection of the integrity of state court decisions granted by Congress through the AEDPA. Overturning this disregard of the AEDPA, and establishing standards to prevent similar errors in the future, will reduce the number of correct criminal judgments erroneously overturned on federal habeas corpus. This result is consistent with the rights of victims and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Francisco Castañeda was murdered on the night of September 22, 1995, at a shopping mall in Santa Fe Springs, California. See *Alvarado* v. *Hickman*, 316 F. 3d 841, 844 (CA9 2002); *People* v. *Soto*, No. B114847 (Cal. App., February 4, 1999), App. to Pet. for Cert. C-3 to C-4.[2] Paul Soto, along with the habeas petitioner in the present case, Michael Alvarado, approached Mr. Castañeda that night with the intent to steal his truck. See App. to Pet. for Cert. C-3. Mr. Castañeda was shot at close range with a large caliber gun and killed. See *id.*, at C-4. Soto shot Castañeda, while Alvarado and Manuel Rivera hid the murder weapon in a park. See *ibid.*

About a month after the murder, Detective Cheryl Comstock contacted Alvarado's mother at her workplace and informed her that the police needed to talk to her son. See 316

2. This opinion is published in part as *People* v. *Soto*, 74 Cal. App. 4th 1099, 88 Cal. Rptr. 2d 688 (1999), but the portion on the *Miranda* claim was not certified for publication.

F. 3d, at 844. Alvarado's mother told Detective Comstock that the defendant's father would bring him to the sheriff's station for an interview. See *ibid.* Both parents accompanied him to the interview. See *ibid.* Alvarado was 17 years old at this time and had no criminal history. See *ibid.* The Alvarados gave Detective Comstock permission to interview their son. See App. to Pet. for Cert. C-12.

Alvarado was interviewed between 12:30 p.m. and 2:30 p.m. See *ibid.* He was never given a statement indicating that he had voluntarily agreed to the interview, nor was he read the *Miranda* v. *Arizona*, 384 U. S. 436 (1966) warnings. See 316 F. 3d, at 844. Alvarado's initial account of the night of the murder contained no reference to the murder or the disposal of the gun. See *ibid.* Detective Comstock questioned this version, noting that other witnesses had contradicted his account. See *ibid.*; App. to Pet. for Cert. C-13. Alvarado then divulged what really happened that night, providing details of the murder and his efforts to hide the weapon. See 316 F. 3d, at 844. Soon after this, Detective Comstock offered Alvarado the use of a phone, which he declined. See App. to Pet. for Cert. C-14. She then stated: "Okay. And we should be done here pretty quick. I'll get you out of here, so you can go about your activities." *Ibid.* The interview ended soon after this, and Alvarado went home with his parents. See *id.*, at C-15. About a month after the interview, Alvarado was charged with murdering Mr. Castañeda. See *ibid.*

Statements made at the interview were admitted against Alvarado at his trial. The jury convicted him of first-degree murder and attempted robbery. Soto was convicted of first-degree murder with the "special circumstance" of murder in the attempt to commit robbery and sentenced to life without parole. The trial court reduced Alvarado's conviction to second-degree murder, stayed sentence on the other charges, and sentenced him to 15-to-life. *Id.*, at C-4 to C-5. On appeal, he asserted that admitting the statements from the interview violated *Miranda*, see *id.*, at C-11, relying primarily upon *People* v.

Aguilera, 51 Cal. App. 4th 1151, 59 Cal. Rptr. 2d 587 (1996). See App. to Pet. for Cert. C-15. *Aguilera* involved a police station interview in which the suspect and his mother went with the police to the station at the officers' request. See 51 Cal. App. 4th, at 1159, 59 Cal. Rptr. 2d, at 590. The *Aguilera* court found that the interview was a custodial interrogation based upon its two-hour length and the intensity, aggressiveness, and intimidating nature of the questioning. See *id.*, at 1164-1165, 59 Cal. Rptr. 2d, at 594. The California Court of Appeal in the present case distinguished *Aguilera*, finding that the questioning in this case was materially less intense and aggressive. See App. to Pet. for Cert. C-17. Its test for custody was whether a reasonable person would feel free to leave under the totality of the circumstances. See *id.*, at C-11 to C-12. This standard was taken from *People* v. *Ochoa*, 19 Cal. 4th 353, 966 P. 2d 442 (1998), which in turn was taken from *Thompson* v. *Keohane*, 516 U. S. 99 (1995). *Ochoa*, *supra*, at 401-402, 966 P. 2d, at 471. The state court concluded: "We are satisfied that a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave." App. to Pet. for Cert. C-17. Therefore the interview was not custodial, and *Miranda* did not apply. The state court then affirmed Alvarado's conviction and sentence. See *id.*, at C-26.

On March 6, 2000, Alvarado filed a federal habeas petition. See 316 F. 3d, at 845. A magistrate judge found that he was free to leave the interview under a totality of the circumstances test, and the District Court adopted the finding and denied the petition. See *ibid.* The Ninth Circuit Court of Appeals reversed, finding that Alvarado was in custody at the time of his interview, and the California Court of Appeal's contrary conclusion was an incorrect and unreasonable application of clearly established federal law. See *id.*, 854-855.

The Ninth Circuit first made a *de novo* determination of the merits of the case. See *id.*, at 845. It held that the defendant's youth rendered his interrogation custodial under the circumstances of the case. See *id.*, at 849-851. After ascertaining the

clearly established legal principles, see *id.*, at 852, the court held that the state court opinion applied them unreasonably. It held that, by not addressing the defendant's age in its custody analysis, the California court's opinion was an unreasonable failure to extend Supreme Court precedent. See *id.*, at 853-854. The legal principle that the California Court of Appeal unreasonably failed to extend "is that juvenile defendants are accorded heightened procedural safeguards commensurate with their age and experience." See *id.*, at 853. This was derived from due process cases involving attacks on the voluntariness of confessions on the waiver of constitutional rights by juveniles. See *id.*, at 848-851. Concluding that the state court decision was unreasonable, the Ninth Circuit reversed the District Court and granted habeas. See *id.*, at 855-857. This Court granted certiorari on September 30, 2003.

SUMMARY OF ARGUMENT

As in *Lockyer* v. *Andrade*, the better approach to implementing the AEDPA in this case is to first determine the clearly established law. This case is also similar to *Andrade* in that for a *Miranda* "custody" determination the relevant law is clearly established only at a very general level. While the precedent governing custody under *Miranda* is not as confused as the proportionality law in *Andrade*, the fact-bound nature of the custody inquiry precludes more specific rules.

The comparatively few cases discussing custody clearly establish several general principles. *Beckwith* v. *United States* shows that it is physical custody, not the subject matter of the interview that governs *Miranda*. *Oregon* v. *Mathiason* and *California* v. *Beheler* equate *Miranda* custody with formal arrest or its functional equivalent. The fact that the interrogation takes place in the station house does not, by itself, mandate applying *Miranda*.

Berkemer v. *McCarty* provides the last significant addition to custody analysis. It reinforces the fact-bound nature of the

custody inquiry by refusing to draw a bright-line rule to govern traffic stops. There was simply no way to draw an accurate line with regard to this or any particular fact. The decision also reiterated *Beheler* and *Mathiason* in equating custody with an arrest. It further held that the custody issue was analyzed under an objective standard. These holdings were neatly summarized in *Thompson* v. *Keohane*, which stated that the test for custody was whether, in light of the circumstances of the interrogation, a reasonable person would feel that he or she was not at liberty to terminate the interrogation and leave.

The California court correctly identified and applied the clearly established law. It employed essentially the same standard as announced in *Thompson*. The fact-bound nature of the totality of the circumstances test makes finding an indistinguishable precedent from this Court's opinions next to impossible. A comparison of the facts of this case to the facts of this Court's custody cases show that none of this Court's precedents are on point. Therefore the California court's opinion was not contrary to clearly established law.

The Ninth Circuit improperly applied a separate "extension" analysis under the "unreasonable application" prong of § 2254(d)(1). The "unreasonable application" portion of § 2254(d)(1) analysis need only consider whether the state court's application of the law to the facts reached a reasonable result. There is no need to inquire whether the state court was reasonable in extending or not extending Supreme Court precedent. That issue is included in the analysis of what rule is "clearly established."

The Ninth Circuit's decision demonstrates how an extension inquiry confuses the analysis. Its analysis focused on Alvarado's age, making this factor essentially dispositive of the case under the Ninth Circuit's failure-to-extend analysis. Reliance on one factor to mandate a result is inconsistent with totality of the circumstances tests like the one governing *Miranda* custody. The Ninth Circuit's overreliance on this one factor to mandate a result subverted the AEDPA.

The California Court of Appeal's finding that there was no custody was reasonable. It properly concentrated on the defendant's main arguments, and appropriately distinguished the main case that he cited. Alvarado's questioning was not harsh or threatening, and his freedom was never conditioned on incriminating himself. He was told that he could phone others about 40 minutes into the interview and was eventually told that he would be allowed to go. While this interrogation is not as clearly noncustodial as cases like *Berkemer* or *Mathiason*, it is readily less custodial than clear custodial arrests or cases like *Orozco*. As in *Andrade*, the state court addressed a case in the middle ground between precedents

ARGUMENT

This case, like *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 123 S. Ct. 1166 (2003) demonstrates the necessity of beginning the analysis of habeas claims under 28 U. S. C. § 2254(d)(1) by determining the relevant clearly established law. Following the since-disapproved circuit precedent of *Van Tran* v. *Lindsey*, 212 F. 3d 1143 (CA9 2000), the Ninth Circuit panel in this case first made its own determination of the merits of the case before applying the deferential standard of § 2254(d)(1). See *Alvarado* v. *Hickman*, 316 F. 3d 841, 845 (CA9 2002). As in *Andrade*, this misstep compromised the Ninth Circuit's AEDPA analysis. Its focus on the "correct" answer led it to focus excessively on one factor, the defendant's youth, when analyzing whether he was in custody. This in turn led the circuit court to a mistaken addition of an "extension" prong to the unreasonable application portion of § 2254(d). See Part II, *infra.* The AEDPA precludes the issuance of the writ based on mere disagreement with the state court. See *Price* v. *Vincent*, 538 U. S. __, 155 L. Ed. 2d 877, 886, 123 S. Ct. 1848, 1853 (2003). *Andrade* shows the better approach. "As a threshold matter here, we first decide what constitutes 'clearly established federal law, as determined by

the Supreme Court of the United States.' § 2254(d)(1)." *Andrade*, 155 L. Ed. 2d, at 155, 123 S. Ct., at 1172. Although this is not the only proper approach, see *ibid.*, it is unquestionably superior to the path taken by the Ninth Circuit.

I. What little law there is governing *Miranda* custody that is clearly established by this Court was applied by the California Court of Appeal.

A. The Test.

What law is clearly established by this Court should usually be a relatively straightforward inquiry. See *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 155, 123 S. Ct. 1166, 1172-1173 (2003). "Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions at the time of the relevant state-court decision.' " *Id.*, 155 L. Ed. 2d, at 155, 123 S. Ct., at 1172 (quoting *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000)). However, when the body of precedent is not a "model of clarity" the inquiry is more complicated. See *id.*, 155 L. Ed. 2d, at 155, 123 S. Ct., at 1173.

While the precedent governing custody under *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is not as confused as the Eighth Amendment proportionality analysis in *Andrade*, it is established at a similar level of generality. In *Andrade*, this Court was plagued by detailed, but conflicting precedents that left the clearly established law at a very high level of abstraction. See *ibid.* Although the clearly established law governing *Miranda* custody is not conflicted, it is general. This is not due to any problems with the Court's administration of *Miranda*. Instead, since the custody inquiry is necessarily fact-bound, specific rules are difficult to find.

B. Clearly Established Law.

Custody is one element that dulls *Miranda*'s bright line. "Unfortunately, the task of defining 'custody' is a slippery one . . . ." *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985). While custody is a threshold requirement for applying *Miranda*, see *Miranda*, 384 U. S., at 477, the cases defining this term are relatively few and general.

Custody was a marginal issue in *Miranda*'s first few years. In *Mathis* v. *United States*, 391 U. S. 1 (1968), this Court held that a suspect is in custody even when he is being questioned about something other than the case under investigation. See *id.*, at 4. *Orozco* v. *Texas*, 394 U. S. 324 (1969) involved a raid of the suspect's boardinghouse residence at 4 a.m. See *id.*, at 325. He was confronted by four police officers in his bedroom. According to one of the officers, the suspect was under arrest and was not free to leave. See *ibid.* This testimony was dispositive on the custody issue. See *id.*, at 327.

The first step towards defining custody is found in *Beckwith* v. *United States*, 425 U. S. 341 (1976). Internal Revenue Service agents met Beckwith at a private home to interview him about potential criminal tax fraud. See *id.*, at 342-343. His motion to suppress his statements made during the interview under *Miranda* was denied by the District Court and Court of Appeals because Beckwith was not in custody during the interview. See *id.*, at 344. Beckwith asserted to this Court that since he was the focus of a criminal investigation by the Internal Revenue Service, he was "under 'psychological restraints' that are the functional and, therefore, the legal equivalent of custody." *Id.*, at 345. This Court rejected this expansion of *Miranda*. Although the *Miranda* Court stated that its rule applied to questioning, "while in custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U. S., at 445, the *Beckwith* Court limited *Miranda* to custodial interrogation. See 425 U. S., at 346-347. The fact that the suspect was the focus of an investigation was irrelevant to the custody issue. See *id.*, at 347. Physical

custody, not the subject matter of the interview, determined whether *Miranda* applied.

The next significant explanation of custody occurred next year in a *per curiam* opinion, *Oregon* v. *Mathiason*, 429 U. S. 492 (1977). An officer investigating a burglary left his card at Mathiason's " 'apartment with a note asking him to call because "I'd like to discuss something with you." ' " *Id.*, at 493 (quoting Oregon Supreme Court opinion). Mathiason called the next day and agreed to meet at the state patrol office, about two blocks from his apartment. At the interview, Mathiason was told that he was not under arrest, but was suspected of the burglary. See *ibid.* The officer then falsely told Mathiason that his fingerprints were found at the scene. After a few minutes, Mathiason admitted to taking the property. See *ibid.* He was then given *Miranda* warnings and gave a taped confession. See *id.*, at 493-494.

The Oregon Supreme Court struck down the conviction, finding that the initial interrogation took place in the type of environment that warranted the *Miranda* warnings. See *id.*, at 492. This Court reversed. It held that Mathiason was never in custody because his freedom to leave was not restricted. See *id.*, at 495. He had been informed of his freedom to leave, and did so at the end of the interview. *Ibid.* The fact that the suspect is taken to the station house does not automatically require *Miranda* warnings before the suspect can be questioned. *Ibid.* "*Miranda* warnings are required only when there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Ibid.* (emphasis in original). This focus on the suspect's freedom was further reflected in the final conclusion that the officer's deception was irrelevant to the custody issue. See *id.*, at 495-496.

Another *per curiam* opinion provided additional insight into custody under *Miranda*. In *California* v. *Beheler*, 463 U. S. 1121 (1983) (*per curiam*), the individual voluntarily accompanied the police to the station house for questioning. See *id.*, at 1122. At that time he was informed that he was not under arrest. See *ibid.* He was then interviewed for 30 minutes without *Miranda* warnings and then permitted to go home. See *ibid.* *Miranda* did not apply to this interrogation because "Beheler was neither taken into custody nor deprived of his freedom of action." *Id.*, at 1123. The circumstances of each case must be taken into account, see *id.*, at 1125, but "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Ibid.* (quoting *Mathiason*, 429 U. S., at 495). As in *Mathiason*, the fact that the interrogation took place in the station house did not mandate *Miranda* warnings. See *ibid.*

In *Minnesota* v. *Murphy*, 465 U. S. 420 (1984), the Court addressed whether *Miranda* warnings had to be given before the suspect incriminated himself in a meeting with his probation officer. See *id.*, at 422-425. The Court noted that *Miranda*'s "extraordinary safeguard" applied only to custodial interrogation. See *id.*, at 430. The fact that Murphy's probation was considered custody for the purpose of habeas corpus was irrelevant, since custody is defined more narrowly under *Miranda* than for habeas corpus jurisdiction. See *ibid.* *Murphy* related custody to *Miranda*'s function. "Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officer's will and confess." *Id.*, at 433. A "probation interview, arranged by appointment at a mutually convenient time" does not generate the same impression as a custodial arrest. See *ibid.* This conclusion was reinforced by the fact that Murphy was not restrained physically and could leave at any time. See *ibid.* Therefore, the probation interview did not satisfy *Beheler*'s definition of custody. See *id.*, at 430-431.

The relationship between custody and freedom was taken to its logical conclusion in the last significant *Miranda* custody case, *Berkemer* v. *McCarty*, 468 U. S. 420 (1984). This

decision addressed whether roadside questioning after a traffic stop constituted custodial questioning under *Miranda*, see *id.*, at 423.[3] The defendant asserted that a traffic stop is a significant deprivation of the occupant's freedom of action, thus qualifying for *Miranda* warnings under the literal language of that decision. See *id.*, at 435. While a traffic stop is a detention that "significantly curtails the 'freedom of action,' of the driver and the passengers," see *id.*, at 436, *Miranda* did not extend this far. *Miranda* must be strictly enforced where it applies, but it only applied "in those types of situations in which the concerns that powered the decision are implicated." *Id.*, at 437.

The temporary and public nature of the traffic stop argued against equating it with custody. These features minimized the coercive pressure of the situation, reducing the need for the *Miranda* warnings. See *id.*, at 437-438. Traffic stops were more analogous to "*Terry* stops," see *Terry* v. *Ohio*, 392 U. S. 1, 30-31 (1968), than formal arrests. See *Berkemer*, 468 U. S., at 439. These stops lack the inherent coercion that justifies *Miranda*, and therefore *Miranda* does not apply to *Terry* stops. See *id.*, at 440. Applying *Beheler*, the *Berkemer* Court noted that *Miranda* "became applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with a formal arrest.' " *Ibid.* (quoting *Beheler*, 463 U. S., at 1125 (*per curiam*)). If a traffic stop blossoms into treatment that places the detainee in custody as a practical matter, then *Miranda* applies. See *ibid.* While this muddies *Miranda* by failing to draw a bright line at traffic stops, this is a necessary compromise between law enforcement interests and the integrity of the *Miranda* rules. See *id.*, at 441.

While no bright line was drawn at traffic stops, *Berkemer* articulated two rules to help clarify custody analysis. First,

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3. The *Berkemer* Court also addressed whether *Miranda* governed the statements made by a suspect accused of a misdemeanor traffic offense. See *id.*, at 422-423. The *Berkemer* Court's conclusion that *Miranda* applied to this situation, see *id.*, at 434, is irrelevant to the present case.

even a seizure does not equal *Miranda* custody until it can "fairly be characterized as the functional equivalent of formal arrest." *Id.*, at 442; cf. *New York* v. *Quarles*, 467 U. S. 649, 655 (1984). Second, the custody issue is resolved under an objective standard. As in *Beckwith*, the officers' unarticulated subjective intent is irrelevant to custody. Instead, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, *supra*, at 442. These two principles form the framework for custody analysis.

Subsequent custody cases add little to these rules. *Pennsylvania* v. *Bruder*, 488 U. S. 9 (1988) (*per curiam*) applied *Berkemer* to a similar set of facts and found no custody in a traffic stop. See *id.*, at 10. *Stansbury* v. *California*, 511 U. S. 318 (1994) (*per curiam*) reiterated the point that whether the suspect is the focus of an investigation is irrelevant to the custody question. See *id.*, at 323.

A habeas decision neatly sums up the clearly established principles governing custody under *Miranda*.

> "The ultimate 'in custody' determination for *Miranda* purposes, we are persuaded, fits within the latter class of cases ["mixed question" rather than historical fact]. Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' " *Thompson* v. *Keohane*, 516 U. S. 99, 112 (1995) (quoting

Beheler, 463 U. S., at 1125 (quoting *Mathiason*, 429 U. S., at 495)) (footnote omitted).[4]

Since custody involves an inquiry into the totality of the circumstances, each case is dependent upon its special set of facts. This precludes bright-line rules, as demonstrated by *Berkemer*'s decision not to draw one with respect to traffic stops, or the Court's recognition that station house questioning is not necessarily custodial. Therefore, no single factor is dispositive when analyzing custody under *Miranda*. The clearly established law cannot get more specific than this passage from *Thompson*.

C. Applying the Standard.

There are two ways that a state court decision can be contrary to clearly established law.

> "A decision by a state court is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' " *Price* v. *Vincent*, 538 U. S. __, 155 L. Ed. 2d 877, 885, 123 S. Ct. 1848, 1853 (2003) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 405-406 (2000)).

The California court's decision did not violate either test.

The California Court of Appeal identified and applied the clearly established standard governing *Miranda* custody. It quoted at length a passage from a California Supreme Court decision, *People* v. *Ochoa*, 19 Cal. 4th 353, 401-402, 966 P. 2d 442, 471 (1998). See App. to Pet. for Cert. C-11 to C-12. The

4. *Thompson* held that *Miranda* custody was a mixed question of law and fact subject to *de novo* review on habeas corpus under 28 U. S. C. § 2254 as it then existed. See 516 U. S., at 106-107. Congress abrogated this holding when it amended § 2254 in AEDPA. See *Williams* v. *Taylor*, 529 U. S. 362, 408, n. * (2000).

passage in *Ochoa* upon which the Court of Appeal relies is a quotation of this Court's statement of the *Miranda* custody test in *Thompson*.[5] Even though the California Court of Appeal did not directly cite federal precedents, it applied the federal standard. This satisfies the first part of the "contrary to" test. See *Early* v. *Packer*, 537 U. S. 3, 9 (2002).

This Court has not confronted a *Miranda* custody case that is factually indistinguishable from the present case. Each of this Court's custody cases is distinguishable from this particular set of facts. There are many details relevant to the custody question. In this case, the suspect was brought in by his parents to the stationhouse after a detective told his mother that the police wished to speak with him about the night of the murder. See *supra*, at 2. The interview lasted about two hours, but Alvarado was informed he could use the phone about 40 minutes into the questioning. While Alvarado was a juvenile, he was 17. He was interviewed by one person, Detective Cheryl Comstock. See App. to Pet. for Cert. C-12 to C-15. While she challenged his initial, false account of the events, the questioning cannot reasonably be considered hostile.

Oregon v. *Mathiason*, 429 U. S. 492 (1977) is close with its nonconfrontational interview in the police station, but the interview in the present case lasted longer than the five minutes in *Mathiason*. See *id.*, at 493-494. The suspect in *Orozco* was confronted by four armed officers at his boardinghouse bedroom at 4:00 a.m. See 394 U. S., at 325. While *Berkemer* did have a station house interrogation, see 468 U. S., at 423, this was after the suspect had been formally arrested at a traffic stop. The traffic stop setting of Berkemer's first interrogation distinguishes it from the present case's station house setting. *Beheler* involved a comparatively short 30-minute interview,

5. While *Ochoa* omits certain parts from the passage in *Thompson* in its quotes, these omissions are inconsequential. They primarily omit references to federal habeas corpus. Compare *Ochoa*, 19 Cal. 4th , at 401-402, 966 P. 2d, at 471, with *Thompson*, 516 U. S., at 112-113.

and the suspect accompanied the police to the station from his house, see 463 U. S., at 1122, rather than coming with his parents. In *Murphy*, the suspect met with a probation officer with whom he regularly met, see 465 U. S., at 422-424, rather than a police detective who had no prior dealings with Alvarado. Alvarado's circumstances in the present case are neither clearly as custodial as a case where this Court has found custody nor clearly equally or less custodial than a case where this Court has not found custody.

Since the California Court of Appeal correctly identified the controlling legal standard and this Court has not rendered a factually indistinguishable decision, the state court decision is not contrary to clearly established law.

II. There is no need for a separate "extension" analysis under the "unreasonable application" prong of § 2254(d)(1).

The present case demonstrates that it is necessary to further refine what is an "unreasonable application" of federal law under § 2254(d)(1). The Ninth Circuit held that "this case is best analyzed under the 'unreasonable application' clause, which permits a writ of habeas corpus only if the judgment of the state court '(2) . . . fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.' " *Alvarado* v. *Hickman*, 316 F. 3d 841, 853 (CA9 2002). The principle that the California Court of Appeal allegedly failed to extend "is that juvenile defendants are accorded heightened procedural safeguards commensurate with their age and experience." *Ibid.* Since juveniles were more susceptible to making involuntary confessions, "[i]t cannot reasonably be argued that a factor so important in analyzing the conduct of a custodial interrogation can become insignificant in the analysis of the circumstances that give rise to the situation namely, in the factual setting that determines whether a juvenile is, in fact, in 'custody.' " *Ibid.* This wrongheaded attempt to graft a

specific test onto a clearly established general rule demonstrates that it is necessary for this Court to resolve the failure-to-extend issue.

A. An Unnecessary Extension.

The "unreasonable application" prong of 28 U. S. C. § 2254(d)(1) generally involves the state court's application of "the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case . . . ." See *Williams* v. *Taylor*, 529 U. S. 362, 406 (2000). *Williams* also noted that the Fourth Circuit, in *Green* v. *French*, 143 F. 3d 865, 869-870 (1998) held that "a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, *supra*, at 407. *Williams* expressly reserved the question whether *Green*'s " 'extension of legal principle' " analysis was correct. See *id.*, at 408-409. The plurality opinion in *Ramdass* v. *Angelone*, 530 U. S. 156, 166 (2000) included it in its summary of *Williams*' holding, but *Penry* v. *Johnson*, 532 U. S. 782, 792 (2001) omitted it. Decisions after *Penry* have also omitted the extension language in their summary of the unreasonable application prong. See, *e.g.*, *Mitchell* v. *Esparza*, 540 U. S. __ (No. 02-1369, Nov. 3, 2003) (slip op., at 6) (*per curiam*); *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 157-158, 123 S. Ct. 1166, 1174 (2003). In *Ramdass*, the state court's refusal to extend the precedent was not only reasonable but correct, see 530 U. S., at 170, so there was no need to inquire in depth about the consequences of an unreasonable refusal to extend. The brief attention to this question in a plurality opinion seems insufficient to resolve a question expressly reserved in *Williams*, and the question should be regarded as unresolved to this point. *Amicus* CJLF submits that the "extension of legal principle" prong of *Green* is unnecessary and would serve only to complicate the analysis.

Common to both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1) is the requirement that the rule in question be "clearly established." For the most part, "whatever would qualify as an old rule under our *Teague* [v. *Lane*, 489 U. S. 288 (1989)] jurisprudence will constitute 'clearly established Federal law . . .' under § 2254(d)(1)." *Williams*, 529 U. S., at 412; see also *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) (using "clearly established" in *Teague* context). This *Teague*-like inquiry includes the question of whether a preexisting precedent applies to the context of the present case.

In *Butler* v. *McKellar*, 494 U. S. 407 (1990), the state court was confronted with the question of whether the rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981) applied to a police request for waiver of *Miranda* rights for a different offense, when the suspect had already invoked his rights for the offense for which he had been arrested. See *Butler*, *supra*, at 410-411. The question was debatable at the time of the state decision, *id.*, at 415, and the subsequent extension of *Edwards* to this context was therefore a "new rule." In § 2254(d)(1) terms, there was no "clearly established Federal law" governing the different-offense situation, although the law governing the same-offense situation had been clearly established in *Edwards*. Similarly, in *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994), no Supreme Court precedent established that the Double Jeopardy Clause applied to noncapital sentencing, and the extension of *Bullington* v. *Missouri*, 451 U. S. 430 (1981) from the capital context to noncapital would have been a new rule. See also *Gilmore* v. *Taylor*, 508 U. S. 333, 350 (1993) (O'Connor, J., concurring in the judgment) (extension of *Winship* line would have been a new rule).

Williams itself provides the example of a case granting relief. The Virginia Supreme Court had extended the rule of *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993) to a new context where it should not apply. *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984) had generally defined "prejudice" for ineffective assistance claims as a "reasonable probability that . . . the result of the proceeding would have been different." *Lockhart* had recognized an exception where the allegedly deficient performance "does not deprive the defendant of any substantive or procedural right to which the law entitles him," 506 U. S., at 372, an exception noted in *Strickland* itself. See 466 U. S., at 695 ("no entitlement to the luck of a lawless decisionmaker"). But *Williams* involved the jury's consideration of mitigating evidence, see 529 U. S., at 415 (opinion of O'Connor, J.), a procedural right to which Williams *was* entitled. Hence, the state court had both extended *Lockhart* to a context where it should not reach, and failed to apply the general rule of *Strickland* in a context where it does apply. This error was "contrary to that clearly established federal law . . . ." *Id.*, at 413. A separate "unreasonable application" inquiry was not necessary in *Williams*, and it would not be necessary in any case where the "extension of legal principle" analysis would properly result in a grant of relief. The statement of the *Williams* rule in *Penry*, 532 U. S., at 792, and the subsequent cases should be confirmed as a complete statement of the required analysis.

B. Subverting General Rules.

The Ninth Circuit's decision demonstrates how the phrase "extends a legal principle" confuses the analysis. In this case the relevant clearly established legal principle is very general, requiring *Miranda* custody to be examined under a totality of the circumstances test. See *supra*, at 13. The Ninth Circuit's "failure-to-extend" analysis focused on Alvarado's juvenile status. See 316 F. 3d, at 853. This became the Ninth Circuit's foot in the door, allowing it to elevate its disagreement with the state court over the custody issue, see *id.*, at 850, into a grant of habeas corpus in spite of the AEDPA's deferential standard. Although the Ninth Circuit's independent analysis of the custody issue purportedly examined the totality of the circumstances, see *ibid.*, its failure-to-extend analysis effectively allowed this case to turn on a single factor—Alvarado's age.

This effectively elevates one element of the circumstances surrounding defendant's questioning into the decisive factor on the custody issue. Analysis like this subverts the totality-of-the-circumstances test for custody, and is inconsistent with this Court's "unreasonable application" decisions.

General, fact-bound rules inherently resist efforts to be subdivided through rigid tests for particular subdivisions. For example, this Court has refused to create a *per se* rule defining the relationship between a traffic stop and *Miranda* custody. While an ordinary traffic stop was not the type of encounter that needed the *Miranda* warnings, other circumstances could elevate this encounter into the equivalent of a custodial arrest. See *Berkemer* v. *McCarty*, 468 U. S. 420, 440 (1984). Any bright-line rule was too imprecise for the fact-bound custody inquiry. Requiring the *Miranda* warnings at every traffic stop would hamper police without advancing Fifth Amendment interests, while a rule that traffic stops could never evolve into a custodial interrogation would subvert *Miranda*. See *id.*, at 441.

Probable cause is another example of how a broad rule is incompatible with rigid subrules. *Illinois* v. *Gates*, 462 U. S. 213 (1983) determined that the probable cause issue was decided by examining the totality of the circumstances of each case. See *id.*, at 230-231. This test simply could not be subdivided into more specific rules. Probable cause was a fluid concept "not readily, or even usefully, reduced to a neat set of legal rules." *Id.*, at 232. The two prongs of the prior test for analyzing whether an informant's tip supported a search warrant, " 'veracity' " and " 'basis of knowledge,' " while relevant, did not have independent importance. See *id.*, at 233. The absence of one factor could be made up by a greater strength in the other factor, and neither factor had to be present if there were "some other indicia of reliability." *Ibid.* Therefore the rigid rule of *Spinelli* v. *United States*, 393 U. S. 410 (1969) concerning probable cause and informant tips had to be overruled. See *Gates*, *supra*, at 238.

This Court has rejected attempts to graft specific subrules onto general rules through federal habeas corpus. The Sixth Amendment guarantee of adequate representation is governed by a broad rule meant to deal with a wide variety of factual circumstances. That is, "whether, in light of all the circumstances, the identified acts were outside the wide range of professionally competent assistance." *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984). *Strickland* expressly rejected "detailed guidelines" and "rigid requirements." *Ibid.* In *Bell* v. *Cone*, 535 U. S. 685 (2002), the circuit court had ruled that *Strickland* mandated a closing argument in every case. See *id.*, at 693. This Court rejected this attempt to short circuit *Strickland*'s general test with a *per se* rule. See *id.*, at 701-702. Similarly, in *Wright* v. *West*, 505 U. S. 277 (1992) this Court effectively rejected an attempt to replace the general rule on the sufficiency of the evidence for conviction of *Jackson* v. *Virginia*, 443 U. S. 307 (1979) with a more specific rule for theft cases. See *West*, *supra*, at 313-314 (Souter, J., concurring in the judgment).

It is similarly wrong to give talismanic status to Alvarado's age. While this factor may be relevant to the custody issue, it is not dispositive by itself. Therefore, the California court's failure to mention this factor in its opinion does not make it automatically unreasonable.

III. The California Court of Appeal's holding that there was no custody is reasonable.

The Ninth Circuit's reasonable application analysis is hopelessly compromised by a series of misunderstandings of the AEDPA. Its focus on the alleged error of the California court's holding allowed it to concentrate on Alvarado's youth to the exclusion of other factors. See *supra*, at 16. This error was exacerbated by its "extension" analysis, which allowed it to subvert the totality of the circumstances test for custody by creating a bright-line rule for juveniles. See Part II, *supra*.

Finally, its analysis is further compromised by its reliance on the now disapproved clear error standard in assessing the state opinion's reasonableness. Compare *Alvarado* v. *Hickman*, 316 F. 3d 841, 855 (CA9 2002), with *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 158, 123 S. Ct. 1166, 1174-1175 (2003). If any decision in this case is unreasonable, it is the Ninth Circuit's.

The California court's opinion sensibly focused on the defendant's main contention, that the case was controlled by *People* v. *Aguilera*, 51 Cal. App. 4th 1151, 59 Cal. Rptr. 2d 587 (1996). See App. to Pet. for Cert. C-15. For a state appellate court to focus its attention on the appellant's primary argument is "entirely acceptable." *Early* v. *Packer*, 537 U. S. 3, 9 (2002) (*per curiam*). As the California court concluded, *Aguilera* was distinguishable from the facts of the present case. Most importantly, an officer in *Aguilera* told the suspect that his going home was dependent upon how quickly he told the truth. See 51 Cal. App. 4th, at 1159, 59 Cal. Rptr. 2d, at 590-591. Indeed, as the interrogation proceeded, one officer told the suspect that he would not leave until he told them the name of the girl who was a witness to the incident. See *id.*, at 1160, 59 Cal. Rptr. 2d, at 591. The present case did not involve any threats such as these, and was thus clearly distinguishable. See App. to Pet. for Cert. C-17.

The California court's conclusion that the interrogation was not custodial is objectively reasonable. As it noted, there were no threats that Alvarado could not leave until he told the truth. See *ibid.* While Detective Comstock did question Alvarado's initial, misleading account of what took place on the night of the murder, as the California court properly noted, he was not subject to "intense pressure . . . ." See *ibid.* This part of the interview was recounted by the California court, and supports this conclusion.

> "Detective Comstock said: 'Okay, we did real good up until this point and everything you've said it's pretty accurate till [*sic*] this point, except for you left out the shooting.' Alvarado asked: 'The shooting?' Detective Comstock repeated: 'Uh huh, the shooting.' Alvarado said: 'Well I had never seen no shooting.' Detective Comstock responded: 'Well I'm afraid you did.' Alvarado repeated his statement that he had seen no shooting. Detective Comstock informed Alvarado that she had witnesses who said 'quite the opposite.'
>
> "She told Alvarado: 'So why don't you take a big [deep] breath, like I told you before, the very best thing just to be honest. I don't have three notebooks full of notes because I haven't been talking to people and there's no way you could have this many people involved in something like that and people making deliveries did uh, the delivery trucks making deliveries, people sitting in donut shops doing things and your group and everybody is not going to lie about this, okay? You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is . . . that they have tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way far fetched different.' " *Id.*, at C-13; see also J. A. 101-102.

Questioning a suspect's account does not force the police to give *Miranda* warnings. The purpose of questioning is to elicit information, and when an officer believes that the suspect is not telling the truth, it is appropriate to contradict the suspect. What matters is whether the suspect feels free to leave. These mild rebukes did not convey to Alvarado any idea that he was not free to leave.

Another objective factor that could weigh in favor of custody is the two-hour length of the interview. See *supra*, at 3. While a longer interview makes a custody finding more likely, there can be no hard and fast rule governing the relation-

ship between the length of the interrogation and the custody issue. In this case, it is not necessary to determine whether a two-hour interrogation tips the scale because Alvarado was told that he could use the phone about 40 minutes into the interview. See *Alvarado*, 316 F. 3d, at 854, and n. 10. Contact with the outside world mitigates the loss of control or separation from the outside that is consistent with custody. Later statements from Detective Comstock telling Alvarado that he would be free to leave reinforces the notion that Alvarado was not in custody.

Andrade, *supra*, confronted a state court decision in between two of this Court's precedents. Andrade's punishment relative to his culpability was more severe than what was upheld in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), but less severe than what was struck down in *Solem* v. *Helm*, 463 U. S. 277 (1983). See *Andrade*, 155 L. Ed. 2d, at 157, 123 S. Ct., at 1174. The state court's decision to uphold a sentence that existed in the twilight zone between *Solem* and *Rummel* was not unreasonable. See *id.*, 155 L. Ed. 2d, at 159, 123 S. Ct., at 1175. The present case fits the same pattern.

The encounter was longer and less clearly consensual than those upheld in *Oregon* v. *Mathiason*, 429 U. S. 492 (1977) (*per curiam*) and *California* v. *Beheler*, 463 U. S. 1121 (1983) (*per curiam*). On the other hand, the interrogation in this case does not have trademarks of a classic custodial interrogation. Alvarado was never told that he was arrested, he was allowed contact with the outside world, he came to the station with his parents, and was not subject to intense, hostile questioning from a group of officers. His encounter was less custodial than the 4:00 a.m. surprise encounter with four officers in *Orozco* v. *Texas*, 394 U. S. 324 (1969), or a traditional custodial arrest, or even the type of encounter found in *Aguilera*. Existing in this middle zone between unquestionably noncustodial and the clearly custodial, Alvarado's questioning may reasonably be considered noncustodial.

This conclusion is reinforced by the comparative unreasonableness of the Ninth Circuit's analysis. The assertion that custody must be judged in light of Alvarado's lack of minimal record, see 316 F. 3d, at 845, is extremely difficult to square with this Court's *Miranda* precedents. Custody is determined under an objective standard. See *Thompson* v. *Keohane*, 516 U. S. 99, 112 (1995). Objectivity with respect to the custody test is typically expressed as rendering irrelevant the unexpressed motivations of the interrogating officers. See *Berkemer* v. *McCarty*, 468 U. S. 420, 442 (1984). However, the Ninth Circuit's creation of subrules for various suspects also threatens *Miranda*'s objectivity. One of *Miranda*'s chief virtues is its clarity. See *Arizona* v. *Roberson*, 486 U. S. 675, 680 (1988). Subdividing its broad "reasonable person" rule for custody into various subrules threatens what clarity *Miranda* has. Since custody already muddies *Miranda*, see *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985), there is no reason to further complicate the rule by making its application dependent upon the personal characteristics of the individual.

Miranda is exclusively concerned with police coercion. "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986). Relying on the suspect's inexperience with the law or his youth pulls *Miranda* away from these moorings and dilutes its objectivity. If hearing voices from God is irrelevant to the validity of a *Miranda* waiver, see *id.*, at 170-171, then it was also reasonable for the California court to not address Alvarado's age and inexperience in its custody analysis. Since the state court's decision was reasonable, this collateral attack on a final judgment can be dismissed without redeciding the merits.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

November, 2003

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 02-1684

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden of California State Prison - Los Angeles County, *Petitioner*,

v.

MICHAEL ALVARADO, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

BILL LOCKYER
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State Solicitor General
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PETITION FOR WRIT OF CERTIORARI FILED MAY 12, 2003
WRIT OF CERTIORARI GRANTED SEPTEMBER 30, 2003

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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Docket as of December 29, 2000 7:17 p.m.

U.S. District Court
Central District of California (Eastern Div.)

CIVIL DOCKET FOR CASE #: 00-CV-326
Michael Alvarado v. R.Q. Hickman

Filed: 05/18/00
Assigned to: Judge Virginia A. Phillips
Referred to: Magistrate Judge Charles F. Eick
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt #: is 2:00-cv-02340
Cause: 28:2254 Petition: Writ of H/C - State

MICHAEL ALVARADO petitioner	Michael Alvarado CDC K-76657 [COR LD NTC] [PRO SE] Ione Mule Creek State Prison P O Box 409000 Ione, CA 95640
v.	
R Q HICKMAN, Acting Warden of Mule Creek State Prison respondent	Beverly K Falk FTS Ext 2389 FAX 213-897-6496 [COR LD NTC] Kenneth C Byrne FTS Ext 2687 FAX 213-897-6496 [COR LD NTC] CAAG - Office of Attorney General of California 300 S Spring St, Ste 500 Los Angeles, CA 90013-1204 213-897-8964

MICHAEL ALVARADO
petitioner

v.

R Q HICKMAN, Acting Warden of
Mule Creek State Prison
respondent

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
3/6/00	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Michael Alvarado in State Custody referred to Magistrate Judge Charles F. Eick. (pc) [Entry date 03/09/00]
3/6/00	2	NOTICE OF REFERENCE to Magistrate Judge Charles F. Eick (pc) [Entry date 03/09/00]
3/9/00	3	ORDER by Magistrate Judge Charles F. Eick requiring ans to pet for writ of h/c. It is ord that respondent file an ans to the pet within 23 days of the date of this order. It is fur ord that if petitioner desires to file a trav to the ans, he shall do so within 15 days of the date the ans is filed. (shb) [Entry date 03/13/00]
3/9/00	4	ORDER by Magistrate Judge Charles F. Eick that petitioner shall serve upon respondent a copy of every future pldg or other doc subm for consideration by the crt. He shall incl with the original paper to be filed with the clerk a certificate stating the date that a true and correct copy of the paper was mailed to respondent or his cnsl. (shb) [Entry date 03/13/00]

3/20/00	5	RECEIPT showing proof of delivery by legal mail of 2 orders received 3/13/00 by Michael Alvarado (shb) [Entry date 03/22/00]
3/20/00	6	RETURN RECEIPT of Certified Mail showing delivery to Office of the Atty General rcvd by signature illegible of petition & 2 orders on 3/15/00 (shb) [Entry date 03/22/00]
3/29/00	7	NOTICE by respondent R Q Hickman of interested parties (shb) [Entry date 03/30/00]
3/29/00	8	NOTICE OF MOTION AND MOTION by respondent R Q Hickman for summary dismissal of pet for writ of h/c Lodged prop ord (shb) [Entry date 03/30/00]
3/29/00	8	REQUEST by respondent R Q Hickman for stay of order requiring return pending mot for dism (shb) [Entry date 03/30/00]
3/30/00	9	MINUTES: The crt is in receipt of respondent's mot for summary dism of pet. Petitioner shall file opp to the mot within 30 days of the date of this order. The crt will take the mot under subm w/o oral arg, unless otherwise ordered. Respondent need not file an answer until further ntc of this crt. by Magistrate Judge Charles F. Eick CR: N/A (shb) [Entry date 04/04/00]
4/24/00	10	OPPOSITION by petitioner Michael Alvarado to motion for summary dismissal of pet for writ of h/c [8-11] (yl) [Entry date 04/25/00]
4/25/00	11	MINUTES: denying motion for summary dismissal of pet for writ of h/c [8-1]; Respondent shall file an ans within 30 days of the date of this order. Petitioner may file a traverse within 15 days of the date the ans is

filed. by Magistrate Judge Charles F. Eick CR: N/A (shb) [Entry date 04/26/00]

5/3/00 12 REQUEST by petitioner Michael Alvarado for appt of cnsl (shb) [Entry date 05/04/00]

5/3/00 13 DECLARATION of Tracy J Dressner by petitioner Michael Alvarado in suppt of request for appt of cnsl [12-1] (shb) [Entry date 05/04/00]

5/3/00 15 DECLARATION of Tracy J. Dressner by petitioner Michael Alvarado re request [12-1] (ab) [Entry date 05/12/00]

5/4/00 14 MINUTES: denying request for appt of cnsl [12-1] by Magistrate Judge Charles F. Eick CR: N/A (shb) [Entry date 05/11/00]

5/9/00 16 ORDER OF THE CHIEF JUDGE # 00-087 approved by Judge Terry J. Hatter Pursuant to the appointment of Judge Richard A. Paez to the 9th Circuit Court of Appeals, this case is transferred from the calendar of Judge Richard A. Paez to the calendar of Judge Virginia A. Phillips for all further proceedings. (cc: all counsel) (rn) [Entry date 05/19/00]

5/18/00 17 NOTICE RE INTRA-DISTRICT TRANSFER filed. Case reassigned to Eastern Division by Order of the Chief Judge # 00-087 filed 5/9/00. New case no. EDCV 00-326 VAP (E) assigned to Judge Virginia A. Phillips for all further proceedings. (Original file transferred.) (cc: all counsel) (rn) [Entry date 05/19/00]

6/12/00 18 ANSWER TO PETITION for Writ of H/C by respondent R Q Hickman [1-1] (am) [Entry date 06/20/00]

6/12/00 19 NOTICE of lodging of docms (3 env) by respondent R Q Hickman (am) [Entry date 06/20/00]

6/21/00 21 REQUEST by petitioner Michael Alvarado for expansion of time to file a traverse to the ans to the petn for writ of h/c (am) [Entry date 06/28/00]

6/22/00 20 MINUTES: The Crt is in receipt of Ptr's req for Expansion of Time to File a Traverse fld 6/21/00. Ptr may file his traverse 20 days of the date of this ord. The Clk is directed to attach a Ptr's svc copy of this min ord a copy of the Ninth Circuit's decision in Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000). Except as expressly stated herein, the req is den by Magistrate Judge Charles F. Eick CR: n/a (yl) [Entry date 06/23/00]

7/3/00 24 TRAVERSE by petitioner Michael Alvarado to ans to the petn for writ of h/c [18-1] (am) [Entry date 07/10/00]

7/5/00 22 REPORT AND RECOMMENDATION issd by Magistrate Judge Charles F. Eick (yl) [Entry date 07/06/00]

7/5/00 -- PLACED IN FILE - NOT USED Propd ord gr petn to compel arbitration & to dism or in the alt to stay (am) [Entry date 07/10/00]

7/6/00 23 NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Charles F. Eick and Lodging of Proposed Judgment and Order (yl) [Entry date 07/06/00]

8/3/00 25 OPPOSITION by petitioner Michael Alvarado to Report and Recommendation [22-1] (am) [Entry date 08/09/00]

8/8/00 26 ORDER by Judge Virginia A. Phillips adopting R&R of US Mag Judge [22-1]. (ENT 8-22-00) mldcpys/ntc. (ab) [Entry date 08/22/00]

8/8/00 27 JUDGMENT AND ORDER: by Judge Virginia A. Phillips against petitioner Michael Alvarado & denying and dismissing the habeas corpus petition [1-1] w/prej and terminating case (MD JS-6). (ENT 8-22-00) (cc: all counsel/ntc) (ab) [Entry date 08/22/00]

8/29/00 28 MINUTES: It is ord that the following docs lodged on 7/12/00 be returned to the Atty General for the State of California: Clerk's transcripts - 3 vols; Reporter's transcripts - 5 vols; Appellant Paul Soto's opening br; Appellant Michael Alvarado's opening br; Respondents bf; Appellants reply br; Appellants reply bf; mot to augment record on appeal; pet for rehearing of appellant Alvarado. by Magistrate Judge Charles F. Eick CR: N/A (shb) [Entry date 08/31/00]

09/11/00 29 NOTICE OF APPEAL by petitioner Michael Alvarado to 9th C/A from Dist. Court Jgm & Ord fld 8/8/00 & ent 8/22/00 [27-2] (cc: Michael Alvarado; St/Atty Gen) COA Pending. (pjap) [Entry date 09/15/00]

9/28/00 30 ORDER by Judge Virginia A. Phillips denying certificate of appealability. [29-1] (cc: all prtys) (fvap) [Entry date 10/10/00]

10/20/00 31 CERTIFICATE of Record Transmitted to USCA (cc: all parties) (pjap) [Entry date 10/20/00]

10/20/00 -- CLERK'S record on appeal transmitted to Circuit vols: 1 (pjap) [Entry date 10/20/00]

10/27/00 32 NOTIFICATION by Circuit Court of Appellate Docket Number 00-56770 (pjap) [Entry date 10/27/00]

12/12/00 33 ORDER FROM USCA: Req for cert of appealability gr w/ respect to following issues: whether statements made by deft were erroneously admitted by trial crt in violation of Miranda V. Arizona. Applnt gr lv to proceed in FP. Opening brief & excerpts of record due 2/1/01; ans brief due 3/1/01; optional reply brief due w/in 14 dys after svc of ans brief. Crt hereby sua sponte appoints cnsl. Cnsl will be apptd by sep ord. (00-56770) (wdc) (wdc) [Entry date 12/29/00]

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Docket as of October 8, 2003 11:15 p.m.

GENERAL DOCKET

US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 00-56770 Filed: 10/24/00
Nsuit: 3530 Habeas corpus (Fed)
Alvarado v. Hickman
Appeal from: Central District of California, Riverside

Case type information:
1) prisoner petition
2) state
3) habeas corpus

Lower court information:

District: 0973-5 : CV-00-00326-VAP/E
presiding judge: Virginia A. Phillips, District Judge
Date Filed: 5/18/00
Date order/judgment: 8/8/00
Date NOA filed: 9/11/00

Fee status: in forma pauperis

Prior cases:
None

Current cases:
None

MICHAEL ALVARADO
Petitioner - Appellant

v.

R Q HICKMAN, WARDEN,
Acting Warden of Mule
Creek State Prison
Respondent - Appellee

Michael Alvarado
K-76657 C3-242UP
[COR LD NTC] [prs]
CSPLAC - CALIFORNIA
STATE PRISON L.A.
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Deborah J. Chuang
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213/897-2052
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CALIFORNIA ATTORNEY
GENERAL (LA)
300 S Spring St.
Los Angeles, CA 90013

MICHAEL ALVARADO

Petitioner - Appellant

v.

R Q HICKMAN, WARDEN, Acting Warden of
Mule Creek State Prison

Respondent - Appellee

00-56770 - Alvarado v. Hickman

10/24/00	Filed request for a certificate of appealability. Date COA denied in DC: 9/28/00 Record on Appeal included (y/n): y (STAFFATT) (bg)
10/24/00	Received District Court case file in 1 ORIG. VOLS. STATE LODGED DOCUMENTS RETURNED TO STATE ATTORNEY GENERAL ON 8/29/00. SEE DOCKET NO. 28. (STAFFATT) (bg)
10/24/00	Received certificate of record. RT filed in DC None requested. [00-56770] (bg)
11/6/00	Filed Michael Alvarado's request for certificate of appealability. served on 11/2/00 STAFF [00-56770] (vt)
12/6/00	Filed order (Michael D. HAWKINS, Sidney R. THOMAS, Marsha S. BERSON,): The request for a coa is granted with respect to the following issues: whether statements made by def were erroneously admitted by the trial court violation of Marianda v. Arizona, etc. Aplt is granted leave to proceed in forma pauperis. The opening brief and excerpts are due Feb.1, 2001; the answering brief is due March 1, 2001; the optional reply brief is due within 14 days after

service of the answering brief. The court hereby sua sponte appoints counsel. Counsel will be appointed by separate order. The Clerk shall serve a copy of this order by facsimile transmission on Maria E. Stratton, FPD, etc., who will locate appointed counsel. The district court shall provede this court with the name and address of appointed counsel within 14 days of locating counsel. [00-56770] (vt)

12/6/00 Fax Maria Stratton, FPD order dated 12/6/00 [00-56770] (vt)

1/25/01 Received copy of District Court order filed on 1/18/01 appoint Tara K. Allen, Esq. counsel of record. (Filed by Magistrate) [00-56770] (vt)

2/15/01 Filed motion & order: (Deputy Clerk: tah/PROMO) the aplt's motion to reset the briefing schedule is granted. etc. The opening brief and excerpts of record are due March 8, 2001, the answering brief is due April 9, 2001, and the optional reply brief is due 14 days from service of the answering brief. (Motion recvd 2/1/01) [00-56770] (vt)

2/28/01 Filed motion & order: (Deputy Clerk: tag/PROMO) The aplt's motion for an ext of time in which to file the opening brief is granted. The opening brief is due April 9, 2001. The answering brief is due May 9, 2001. The optional reply brief is due 14 days form service of the answering brief. (Motion recvd 2/23/01) [00-56770] (vt)

3/30/01 Filed motion & order: (Deputy Clerk: tah/PROMO) The aplt's motion for a second ext of time in which to file the opening brief is granted. The opening brief is due May 7, 2001. In view of the lengthy ext of time granted by

way of this order and the previous order, any further request for an ext of time to file this brief is disfavored. The answering brief is due June 6, 2001. The optional reply brief is due 14 days from service of the answering brief. (Motion recvd 3/27/01) [00-56770] (vt)

5/9/01 Filed original and 15 copies Appellant Michael Alvarado opening brief (Informal: no) 19 pages and five excerpts of record in 01 volumes; served on 5/7/01 [00-56770] (gail)

5/30/01 14 day oral extension by phone of time to file Appellee's brief. [00-56770] appellee's brief due 6/20/01; the optional reply brief is due 14 days from service of the answering brief. (cg)

6/21/01 Filed original and 15 copies appellee R Q Hickman's 23 pages brief and 5 supplemental excerpts of record in 3 volumes; served on 6/19/01 [00-56770] (ba)

7/6/01 14 day oral extension by phone of time file Appellant's reply brief. [00-56770] appellants' reply brief due 7/30/01 (cg)

7/16/01 Calendar check performed [00-56770] (th)

7/17/01 FILED CERTIFIED RECORD ON APPEAL; 1 CLERK'S RECORD. (ORIGINAL) [00-56770] (sd)

8/1/01 Filed original and 15 copies Michael Alvarado reply brief, (Informal: no) 7 pages; served on 7/30/01 PANEL (vt)

8/6/01 Screening letter sent. [00-56770] (th)

9/10/01 SUBMITTED TO SCREENING PANEL 331. (Oral) [00-56770] [00-56770] (th)

9/21/01	Removed from screening calendar. Parties notified. [00-56770] [00-56770] (th)
10/7/01	Calendar check performed [00-56770] (aw)
10/25/01	Calendar materials being prepared. [00-56770] [00-56770] (rei)
10/30/01	CALENDARED: PAS. Jan 14, 2002 1:30 PM Courtroom 1 [00-56770] (rei)
11/2/01	Received letter from pro se dated 10/29/01 re: req for status of cs (sent public dkt to Aplt) CASEFILE (gail)
1/14/02	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Richard D. Cudahy, M. M. McKEOWN [00-56770] (pg)
12/18/02	FILED OPINION: GRANTED We VACATE his state court conviction for second degree murder and attempted robbery. If a retrial of the def is in prospect, it shall be undertaken within 120 days of entry of this judgment. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Mary M. SCHROEDER; Richard D. Cudahy, author; M. M. McKEOWN.) FILED AND ENTERED JUDGMENT. [00-56770] (vt)
12/23/02	Filed respondent's emergency motion for modification of opinion; served on 12/19/02. (PANEL) [00-56770] (ca)
12/31/02	Filed original and 50 copies Appellee R Q Hickman petition for panel rehearing and petition for rehearing en banc 18 p. pages., served on 12/30/02 PANEL & ALL ACTIVE JUDGES (vt)

1/10/03	Rec'd notice of change of address from Michael Alvarado for Appellant Michael Alvarado dated 1/7/03. (new address CA State Prison, Los Angeles County, 44750 60th Street, West, Lancaster, CA 93536) (vt)
1/21/03	Filed aplt's emergency motion for immediate release; and opposition to motion for modification of opinion; served on 01/20/03. (FED EX TO PANEL) [00-56770] [4633359] (dv)
1/24/03	Filed Appellee's opposition to motion for immediate release; reply to opposition to motion for modification of opinion; served on 1/23/03. (Fedex to PANEL) [00-56770] (ca)
2/11/03	FILED ORDER AND OPINION: Alvarado's petition for writ of habeas corpus is REVERSED. On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Alvarado be released form custody unless the state begins trial proceedings within 120 days of the issuancae of the mandate. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Mary M. SCHROEDER; Richard D. Cudahy, author; M. M. McKEOWN.) (FILED AND ENTERED JUDGMENT. [00-56770] (vt)
2/12/03	Filed Deborah J. Chuang's motion to stay the mandate; served on 2/11/03 (AUTHOR) (vt)
3/28/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1684 filed on 5/12/03. PANEL [00-56770] (vt)
5/16/03	Filed Deborah J. Chuang's motion to stay the mandate until the U.S. Supreme Court's final

	disposition of resp's petition for writ of certiorari. served on 5/15/03 PANEL (vt)
6/2/03	Filed order (Mary M. SCHROEDER, Richard D. Cudahy, M. M. McKEOWN): Respondent-Appellee's mtn for stay of the issuance of the mdt pending application for writ of cert is GRANTED. (cite) Therefore, it is ordered that the mdt is stayed pending the filing of the petition for writ of cert in the Supreme Ct. The stay shall continue until final dispo by the Supreme Ct. [00-56770] (je)
9/30/03	Recv'd petr's courtesy copy of his writ of certiorari filed in Supreme Court. case file [00-56770] (vt)
9/30/03	Rec'd courtsey copy of resp's brief in opposition to writ of certiorari. case file [00-56770] (vt)
10/6/03	Received notice from Supreme Court, petition for certiorari GRANTED on 9/30/03. Supreme Court No. 02-1684 (vt)

SUPREME COURT
FILED
DEC 15 1999

Second Appellate District, Division Four, No. B114847
S083052

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

v.

PAUL R. SOTO Et Al., Appellants

Appellants' petition for review DENIED.

/s/
Chief Justice

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MICHAEL ALVARADO
Name
K-76657
Prison Identification/Booking No.
MULE CREEK STATE PRISON
Address or Place of Confinement

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address.

Note: If represented by an attorney; his name, address & telephone number.

FILED
CLERK, U.S.
DISTRICT COURT
MAR 6 2000
CENTRAL
DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALVARADO FULL NAME (Include name under which you were convicted) Petitioner, v. R.Q. HICKMAN, Acting Warden of Mule Creek State Prison NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON having custody of petitioner Respondent.	CASE NO. CV 00-02340-RAP (E) To be supplied by the Clerk of the United States District Court PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C. § 2254) PLACE/COUNTY OF CONVICTION Los Angeles PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT (LIST BY CASE NUMBER) CV _____ CV _____ CV _____ CV _____

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS - READ CAREFULLY

This petition shall be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. You must set forth CONCISELY the answer to each question in the proper space on the form. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this petition, except that ONE separate additional page is permitted in answering Question No. 10.

Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

If you are seeking leave to proceed in forma pauperis (without paying the $5.00 filing fee and other court costs), then you must also complete and execute the declaration on the last two pages, setting forth information which establishes your inability to pay the fees and costs of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal instruction complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $25.00, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Central District of California, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, ATTN: Intake/Docket Section.

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.

Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1. __X__ A conviction.

2. _____ A sentence.

3. _____ Jail or prison conditions.

4. _____ Prison discipline.

5. _____ A parole problem.

6. _____ Other.

(* See attached WRIT OF HABEAS CORPUS)

MICHAEL ALVARADO
K-76657
Mule Creek State Prison
P.O. Box 409000
Ione, CA 95640-9000

IN PRO PER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALVARADO, Petitioner, v. RODNEY HICKMAN, Acting Warden of Mule Creek State Prison Respondent.	)	Case No. _____ **PETITION FOR WRIT OF HABEAS CORPUS**

[i]

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[1]

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IN PRO PER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALVARADO, Petitioner, v. RODNEY HICKMAN, Acting Warden of Mule Creek State Prison Respondent.	**PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, MICHAEL ALVARADO, hereby petitions this Court for a writ of habeas corpus. As set forth herein, petitioner is being held under a conviction and sentence in violation of the United States Constitution.

[2]

JURISDICTIONAL ALLEGATIONS[1/]

1. Place of Detention: Mule Creek State Prison at Ione, California.

2. Conviction on which petition is based:

a. Nature of offenses involved:

Count I: second degree murder;

Count II: attempted robbery.

As to both counts, the jury also found true the allegation that a principal was armed with a firearm.

b. California Penal or other code sections:

Count I: Penal Code § 187;

Count II: Penal Code §§ 664/211;

Principal Armed Allegation: Penal Code § 12022(a)(1).

c. Name and location of sentencing court:

Los Angeles County Superior Court, Norwalk, California.

d. Case Number: VA 035109

---

1. The jurisdictional allegations are set forth in a manner equivalent to this Court's standard form.

e. Date of Conviction: March 18, 1997;

f. Date of Sentence: November 14, 1997.

g. Length of Sentence for Each Count:

Count I: 15 years to life.

Count II: Stayed pursuant to Penal Code § 654.

Principal Armed Enhancement: One year permanently stayed.

h. Plea: Not guilty.

i. Kind of trial: Jury.

j. Did you testify at trial: Yes.

[3] 3. Did you appeal: Yes.

4. a. Name of Court: California Court of Appeal

b. Result: Affirmed.

c. Date of result: September 13, 1999.

d. Citation of Opinion: 74 Cal.App.4th 1099

e. Grounds raised (summarized):

1. Petitioner's statements to the police were obtained in violation of Miranda because petitioner was,

objectively, "in custody" at the time his statements were obtained;

2. The evidence was insufficient to establish that petitioner was an aider and abetter of the attempted robbery perpetrated by the co-defendant;

3. Petitioner's sentence of 15 years to life is disproportionate to his level of culpability and must be reduced further;

4. The trial court erred in denying three wheeler motions after the prosecutor used her peremptory challenges to exclude Hispanics and African-Americans from petitioner's jury;

5. Petitioner was deprived of a fair trial when the prosecutor repeatedly displayed a large revolver to the jury and elicited testimony about the revolver even though the prosecutor knew she could not connect the revolver to the case and had to move to withdraw the revolver and the testimony about the revolver.

5. Other petitions, applications, or motions: Yes.

6. a. Name of Court: Supreme Court of California

b. Nature of Proceeding: Petition for Review

Grounds raised (summarized):

[4] 1. Whether the trial court erred in ruling that it had no discretion to reduce a first degree felony murder conviction below second degree murder (to manslaughter) after it found the sentence for first degree felony murder to be cruel and unusual punishment under the circumstances;

2. Whether the appellate court erred in holding that the evidence in a case must establish the elements of a lesser offense of homicide before a trial court can reduce a first degree felony murder conviction that has yielded a sentence found to constitute cruel and unusual punishment pursuant to People v. Dillon (1983) 34 Cal.3d 441;

3. Whether the trial court and appellate court erred in finding that petitioner was not "in custody" for purposes of being advised of his Miranda rights even though petitioner,

a 17-year-old with no prior criminal history, was interrogated by a homicide detective at the sheriff's station for two hours.

d. Result: Denied.

e. Date of Result: December 14, 1999.

f. Citation of Result: Unpublished.

7. Was an evidentiary hearing held: No.

8. a. Name of Court: ⊘

9. Counsel:

a. Preliminary hearing: Joseph Gutierrez

b. Trial: Joseph Gutierrez.

c. Appeal: Tracy Dressner.

10. Petitioner presently has no appeal, petition, or other proceedings pending in any other court concerning these convictions.

[5]

STATEMENT OF FACTS

The Prosecution's Case

On September 22, 1995, Manuel Rivera lived next to a shopping mall in Santa Fe Springs.[2/] (RT 266.) Rivera spent the day with two friends, petitioner and Jason Romero, at Town Center, a local activity center for youths. (RT 266.) In the late afternoon, Rivera and petitioner went to Rivera's house. (RT 267.) That evening, a number of young people joined Rivera and petitioner at Rivera's house -- Jason, Valerie, Desmond, Paul Soto, Toni, and Sonja. (RT 269.) Soto was Valerie's boyfriend, and she invited him to Rivera's house. (RT 374, 375.) Over the course of several hours, the group (except for Valerie) drank beer and strawberry wine and smoked marijuana. (RT 269, 375, 391, 394.)

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2. The mall was approximately 34 feet from Rivera's backyard. (RT 324.) The mall included what Rivera described as a police substation (RT 324) but which a sheriff deputy described as a police services center run by public safety officials not police officers (RT 436).

Sometime after midnight, Rivera, petitioner, Jason, Desmond, Soto, and Valerie went over to the shopping mall to use the pay telephones because there was no telephone at Rivera's house.[3] (RT 270, 274.) An older truck driven by an older male pulled into the parking lot. (RT 275.) Valerie approached the truck and obtained a dollar from the man. (RT 276, 382.) The man then drove the truck over to a nearby dumpster and began collecting cardboard from the dumpster. (RT 277, 382.) Valerie and Desmond went into the donut shop where Valerie used the dollar to buy a cherry fruit punch. (RT [6] 384, 410.)

At that time, Soto was standing at the planter near the Jack's Market and near the phones. (RT 279.) Soto said to everyone but petitioner who was in the donut shop, "Let's jack." (RT 279.) Rivera assumed Soto was referring to stealing the man's truck. (RT 279.) No one said or did anything. (RT 280.)

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3. Valerie went to the pay phones about four times during the course of the night. (RT 376.) During one of those trips, she returned to the party with two friends, Selina and Regina. (RT 377.)

About two minutes later, after petitioner returned, Soto again said, "Let's jack." (RT 281.) Petitioner said, "Let's go."[4] (RT 283.) About 30 seconds passed and Soto and petitioner began walking towards the truck. (RT 284.) Soto said to petitioner, "I'll give you half." (RT 284.)

Soto walked in front of and to the side of petitioner and headed towards the driver's side of the truck.[5] (RT 285.) The driver of the truck was between the dumpster and the driver's side of his truck. (RT 288.) Petitioner walked towards the passenger door of the truck. (RT 286.) Soto and petitioner were walking at a regular pace.[6] (RT 286.) While petitioner was near the right rear truck tire, Soto appeared to be saying something to the man. (RT 289-230.) About 30 seconds later,

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4. Rivera subsequently retracted this part of his testimony during cross-examination. (RT 313.)

5. Valerie saw Soto and petitioner walk towards the truck but did not see where they went because she was busy talking to Desmond and a pillar was blocking her view. (RT 386, 423.) She noted that Soto and petitioner were not walking side by side. (RT 385.) When she stopped paying attention to Soto and petitioner, they were closer to the group then to the dumpster. (RT 400.)

6. Later, Rivera said Soto was walking faster and was about 9 feet ahead of petitioner. (RT 368.)

there was a gunshot. (RT 292, 388.) Valerie also heard a scream. (RT 388.) Everyone, including Soto and petitioner, [7] ran back to Rivera's house.[7/] (RT 293, 389, 419.)

When Soto returned to the house, he had blood on his shirt. (RT 294, 390, 415.) Soto went into Rivera's room and removed his shirt and went into the bathroom and cleaned up. (RT 294-295.) Soto left a black, long-barrelled gun in Rivera's room.[8/] (RT 296.) Soto told Rivera that he had demanded money and keys from the man and then shot the man when he did not comply.[9/] (RT 298.) Soto also said to Rivera and petitioner, "Don't say shit."[10/] (RT 301.) Rivera and petitioner

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7. According to Rivera, Desmond, Valerie, and Jason left the house about one minute later. (RT 350.) Valerie testified that Jason left the shopping center earlier, before the shooting. (RT 378.)

8. Rivera did not actually see Soto put the gun in his room but when he found the gun under his bed later that evening he assumed Soto put it there because nobody else had a gun. (RT 296, 299.) Later, after refreshing his memory with the transcripts of a police interview, Rivera remembered that he saw Soto holding the gun in the bedroom. (RT 302.)

9. Rivera initially denied that Soto said anything about the shooting but changed his testimony after refreshing his memory with a transcript of an earlier interview he had with the police. (RT 297.)

10. Rivera also had to refresh his memory to recall that Soto made this statement. (RT 300.)

went with Soto to hide the gun at a park.[11/] (RT 303.) Rivera opined that a gun marked as Exhibit 3 looked like the gun he helped hide with Soto and petitioner.[12/] (RT 364.)

At about 1:00 a.m. on September 23, 1995, a Norwalk sheriff [8] deputy responded to a call of a possible assault with a deadly weapon at the shopping center and found a man, later identified as Francisco Castaneda, face down surrounded by blood. (RT 430-433, 520.) Castaneda was approximately two feet west of the dumpster and 10-15 feet from the front corner of the truck. (RT 440-441.) Castaneda was 5'3" and weighed 160 pounds. (RT 475.) He died of a gunshot wound to the chest. (RT 476.) There was soot surrounding the entrance wound suggesting that the shot was fired at close range and was possibly a contact wound. (RT 477, 478.)

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11. Rivera was granted immunity from prosecution for his testimony. (RT 304.) Some time after the shooting, Rivera told Sonja, one of the girls who had been at his house that night, that he thought he would be arrested. (RT 324.)

12. The court eventually struck the gun marked as Exhibit 3 and all of the evidence regarding the gun because the prosecution could not link the gun to the case. (RT 511-517.) The testimony about the gun and subsequent striking of that testimony are described in more detail in Argument V, below.

The prosecution played tape-recorded excerpts from an interview petitioner had with the police on October 24, 1995. (RT 487-488; Exhibit 8.) On the tape, petitioner said he knew Soto was going to jack the man and take his truck so they could get home.[13/] (RT 609.) Just before the shooting incident, Soto sat down and pulled his gun out.[14/] (RT 628, 635.) Soto said something like, "So you want to go get a car" or "You want to find a ride home." (RT 620.) Soto said that out loud to the whole group; he did not address it to any particular person.[15/] (RT 621.) Nobody said anything. Soto said, "Who is going to go with me?" (RT 622.) Petitioner then walked over [9] to the

13. During cross-examination, petitioner explained that he told the detective that information based on what he was later told by other people. (RT 609.) Rivera told petitioner later that night that Soto had suggested that they take the truck because some of the group needed a ride home. (RT 617-618.) Although petitioner told the detective that he never discussed the incident with Rivera, petitioner had actually discussed the situation with Rivera that night and every time he saw Rivera after that. (RT 636, 655.)

14. During cross-examination, petitioner said he did not realize until much later that Soto was flashing a gun. (RT 629.)

15. During cross-examination, petitioner testified that Rivera told him all the information about what Soto said; petitioner did not hear it himself. (RT 619-620.)

truck and went by the passenger side of the truck.[16/] (RT 611.) When petitioner walked over there he had no intention to Soto hurting the man. (RT 612.) After Soto approached the driver's side, petitioner heard a shot, saw the man fall on the truck, and saw everyone else running so he ran. (RT 614, 644, 645.) Later that night, petitioner and Rivera hid Soto's gun in some bushes near a park. (RT 648.) The next morning, Desmond and a guy petitioner did not know came to Rivera's house to retrieve the gun. (RT 650.) Petitioner directed them to the location of the stashed gun. (RT 652.)

The prosecution also played a taped interview Soto had with the police on November 30, 1995. (RT 489; Exhibit 10.) In that tape, Soto said he was drunk when the shooting took place. (Exhibit 10.) Soto said he was trying to rob the man of his money when the gun went off accidentally. (Exhibit 10.)

16. During cross-examination, petitioner explained that he just walked by the truck on his way to the restaurant. (RT 611.) He and Soto happened to walk towards the truck at the same time by coincidence. (RT 613, 633.) He did not know what Soto was going to do. (RT 612.) He stopped by the truck and looked through the truck window but could not see what was going on. (RT 612.) He heard a shot and a scream and saw the man fall on the truck. (RT 614.) He figured the man was injured. (Rt 614.)

Soto did not recall anyone walking up to the truck with him nor did he recall asking anyone to go up to the truck with him. (Exhibit 10.)

The Defense Case

Rivera's inconsistencies

Petitioner and his co-defendant used their cross-examination of Rivera to highlight inconsistencies in Rivera's testimony:

Rivera admitted that he never actually heard petitioner say, [10] "Let's go." (RT 313, 316.) In fact, Rivera said he told petitioner's attorney and investigator during a previous interview that he could not be sure if petitioner actually said that. (RT 314.) Rivera was not sure whether petitioner said anything. (RT 320, 333.) On redirect examination, Rivera said he saw petitioner move his mouth after Soto said "Let's jack" but did not hear what petitioner said.[17/] (RT 356, 358.)

17. Rivera conceded that he had discussed the case with the prosecutor and the police at the lunch break before his redirect testimony. (RT 364.)

Rivera also admitted that he lied to the police about this case. (RT 310.) Rivera was interviewed by the police 4-5 times with each interview lasting 45-90 minutes. (RT 347-348.) On February 21, 1997, he told the police that only Soto and petitioner hid the gun. (RT 309, 365.) Rivera acknowledged that he never told anyone that Soto said, "Let's split it" until sometime after 1997. (RT 315.) During his interviews with the police, Rivera never said that Soto said "let's jack" two times. (RT 317, 365.) When Rivera first talked to the police he withheld the names of two of the people who attended the party at his house -- Sonja and Toni. (RT 324.) Rivera initially told the police that he heard the conversation at the dumpster, but he really did not hear anything.[18/] (RT 328.)

Rivera repeatedly vacillated about his whereabouts during the "let's jack" conversation.[19/] During cross-examination

18. Rivera explained during his redirect examination that he never lied to the police, he just withheld information because he was scared. (RT 353, 355.)

19. Valerie did not know where Rivera was during this time. (RT 396.)

Rivera [11] testified that he was on the telephone during the "let's jack" conversation. (RT 315, 334.) The telephones were in a recessed alcove around the corner from the donut store and the planter area of the shopping center where the "let's jack" conversation took place. (RT 317, 320, 339.) A person on the telephone could not see the donut shop/planter area. (RT 317, 320, 339.) Later, on redirect examination, Rivera said he was at the planter when the conversation occurred and during the time Soto and petitioner walked towards the truck. (RT 358.) On recross-examination, Rivera said he was at the telephones when he heard the conversation between Soto and petitioner as they walked towards the truck. (RT 367.) Later during recross, Rivera said he was by the planter and not by the telephones when Soto said "let's jack." (RT 371.) Rivera admitted that he had changed his testimony on that point since having a lunch meeting with the prosecutor and the police during a break in his testimony. (RT 371.)

Rivera also testified that he never saw a gun at any time that night prior to hearing the gunshot.[20] (RT 321, 330.) There had not been any conversation at his house about stealing someone's car or money.[21] (RT 321.) Petitioner lived about ½ mile from the shopping center. (RT 322.) Rivera knew that petitioner had previously walked from his home to the shopping center and to Town Center 1½ blocks from the shopping center. (RT 322.) Petitioner was planning on spending [12] the night at Rivera's house and had money with him that night. (RT 323.) Rivera knew petitioner for about two years and had never seen petitioner with Soto before that night.[22] (RT 323.) Rivera also did not know Soto prior to that night. (RT 324.)

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20. Valerie never saw a gun before the shooting either. (RT 392.)

21. Valerie also never heard any conversation about robbing or jacking anyone. (RT 393.) She was waiting at the shopping center for her ex-boyfriend to pick her up and give her a ride. (RT 394.) Soto presented the testimony of Desmond Pacheco who also said that he did not hear any discussion about a robbery or a shooting. 9RT 528.) Desmond was staying at his grandfather's house about one block from Rivera's house so he did not need a ride home that night. (RT 529.)

22. Valerie testified that she knew Soto since elementary school and knew petitioner for about one year. (RT 398.) That night was the first time Soto and petitioner had met. (RT 399.)

Rivera revealed that in the hours before the shooting, he drank two-40 ounce beers, drank wine and tequila, and smoked marijuana.[23] (RT 331, 336.) He described himself as somewhat stoned and drunk that night. (RT 330, 342.) Rivera was still drinking beer when he was on the telephone.[24] (RT 342.) Some of the other people at the people party, including Soto, were also drunk.[25] (RT 335.) Everyone was laughing and staggering when they went to the shopping center. (RT 335.) One guy even needed help walking. (RT 335.) On redirect examination, Rivera said that he, petitioner and Soto could talk, walk, and run that night without any problems. (RT 360-361.)

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23. Desmond recalled that the people at Rivera's house were drinking 40-ounce beers and tequila and smoking marijuana. (RT 523.) Desmond had been smoking marijuana all day. (RT 527.) By that night he was physically sick and staggering. (RT 525, 528.)

24. A 40-ounce beer was on top of one of the telephones when the crime scene photos were taken. (RT 338.) Rivera said that was his beer. (RT 373.)

25. Valerie did not believe that anyone at the party was drunk. (RT 391.)

Petitioner's Testimony

Petitioner was 17 years old in September 1995. (RT 548.) He lived about ½ mile from the shopping center and walked there often. (RT 549.) The mall contained fast food shops, clothing stores, cleaners, and a barber. (RT 554.) He had been going to that shopping [13] center all of his life. (RT 549.)

Petitioner walked to Rivera's house at about 3 or 4:00 p.m. on September 24, 1995. (RT 565.) He and Rivera walked to Town Center and met up with Jason. (RT 566.) They also saw Valerie, Desmond, Sonja and Toni at Town Center. (RT 567.) Eventually petitioner, Jason, and Rivera returned to Rivera's house. (RT 568.) Later, Valerie, Sonja, and Toni joined them. (RT 568.) The group gathered in Rivera's bedroom where they listened to the radio and drank 40-ounce beers, strawberry wine, and vodka or tequila. (RT 569.) Petitioner drank two 40-ounce beers and a ½ bottle of wine, plus smoked marijuana. (RT 571-572.) Petitioner felt drunk but was not staggering, slurring his speech, or out of control. (RT 573.)

People were coming and going to the pay telephones at the mall. (RT 573.) At one point, Valerie left and returned with Desmond and Soto, who petitioner met for the first time that night. (RT 551, 574, 580.) Two girls --Selina and Regina-- also joined the party which lasted 3-4- hours. (RT 578.) At no time during the party did petitioner see a gun or hear anyone talking about stealing a car. (RT 581.)

Around 11:00 p.m., the only people left at Rivera's house were petitioner, Rivera, Soto, Desmond, and Valerie. (RT 583.) Soto, Desmond, and Valerie left to use the phones and find a ride home. (RT 584.) Petitioner and Rivera got ready to go to bed.[26/] Rivera then decided to go to the phones one last time to call one of the girls who had left the party earlier. (RT 586.) At Rivera's request, [14] petitioner accompanied him back to the phones by the Jack's Market at the shopping center. (RT 586-587.)

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26. Petitioner was spending the night at Rivera's house as he had done a number of times before. (RT 566.)

While Rivera was on the phone, petitioner went into the donut store to buy a donut and cigarettes. (RT 587.) Petitioner then talked to Valerie for a few minutes on the sidewalk near a planter. (RT 591.) After that, petitioner wandered around the mall. (RT 592.) During his walk, he saw an old white truck at the dumpster. (RT 592.) As petitioner walked towards a Yoshinoya restaurant, he was between the truck and the restaurant for about 15-30 seconds. (RT 593.) At that point, petitioner heard a gunshot. (RT 593.)

Petitioner did not kill or rob Castaneda nor did he intend for Castaneda to be killed. (RT 550.) He never touched Castaneda, the truck, or the contents of the truck. (RT 550.) He never talked with a man near the truck, never demanded anything, and never made any menacing gestures. (RT 596.) He did not have a gun or bullets that day. (RT 550.) He did not encourage Soto. (RT 670.) He had no idea what was going on. (RT 670.)

[15]

CLAIM FOR RELIEF

I.

Petitioner'S STATEMENTS TO THE POLICE WERE OBTAINED IN VIOLATION OF MIRANDA BECAUSE Petitioner WAS, OBJECTIVELY, "IN CUSTODY" AT THE TIME OF HIS POLICE INTERROGATION YET HE WAS NOT GIVEN ANY MIRANDA ADVISEMENTS

Petitioner was convicted of murder almost entirely on the basis of statements he made to a homicide detective during two hours of questioning at the sheriff's station. Despite a multitude of factors that demonstrated that petitioner was, effectively, in custody during this questioning, petitioner was never advised of nor waived his Miranda rights. This gross violation of petitioner's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel should have rendered petitioner's statement inadmissible. The prosecution's use of

petitioner's statement requires a reversal of petitioner's murder conviction.

Petitioner raised this Miranda issue in his appeal. The state appellate court rejected the argument. In doing so, the appellate court relied almost exclusively on distinguishing the facts of petitioner's case with the facts in People v. Aguilera, 51 Cal.App.4th 1151 (1996), a case where a defendant successfully challenged on appeal the admission of his statements because they were obtained in violation of Miranda. The state court did not explicitly address petitioner's constitutional arguments.

The state court's "in custody" determination presents a mixed question of law and fact. (Thompson v. Keohane (1995) 516 U.S. 99 [16] [116 S.Ct. 457, 133 L.Ed.2d 383].) Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") which governs this case, a mixed question of law and fact is reviewed under the "unreasonable application prong" of 28 U.S.C. § 2254(d)(1). (Moore v. Calderon (9th Cir.) 108 F.3d 261, 265 n.3 [cert. denied, 521 U.S. 111 (1997)].) "The

Supreme Court need not have addressed a factually identical case, § 2254(d) only requires that the Supreme Court clearly determine the law." (Houston v. Roe (9th Cir. 1999) 177 F.3d 901, 905.) As discussed below, the state court's disposition was an unreasonable application of Miranda v. Arizona (1966) 384 U.S. 436 and the United States Supreme Court cases construing Miranda because the objective facts surrounding petitioner's interrogation demonstrate that a reasonable person would have believed that he was "in custody" during the critical moments of the interrogation.

A. The Circumstances Surrounding Petitioner's Interrogation by a Homicide Detective

Petitioner, a 17-year-old with no prior criminal history, was interviewed by a detective from the Los Angeles Sheriff's homicide division on October 24, 1995, about a month after the shooting. At the beginning of the taped interview, detective Comstock stated that she was interviewing petitioner at the Pico Rivera Sheriff's Station. (AI 1.)[27] Petitioner, who lived at

27. "AI" refers to Alvarado Interview and the number refers to the page number on the upper right hand corner of the transcript. The transcript is contained in the Motion to Augment filed in the Court of Appeal on September 11, 1998.

home with his parents, came to the station accompanied by his parents after the detective left a message at petitioner's parent's house stating that she needed to talk with him. (AI 1.) The detective then followed up that message by [17] calling petitioner's mother at her job at the Pico Rivera post office. (AI 1.) At the time of the interview, petitioner's parents were in the lobby of the sheriff's station and had given the detective permission to interview petitioner. (AI 1.) Petitioner and his parents had asked if his parents could be present for the interview, but the detective refused the request. (RT 9, 10.)

Petitioner's interview was the first time petitioner had ever been questioned by law enforcement. (RT 10, 552.) The detective questioned petitioner for two hours with the interview beginning at about 12:30 p.m. and concluding at about 2:30 p.m. (RT 498, 505, AI 1, 61.) The detective never told petitioner of his Miranda rights and petitioner never waived his

Miranda rights. (RT 501.) The detective did not believe that Miranda advisements were necessary. (RT 501.)

The interview with petitioner took place after the homicide detectives had conducted two interviews with Rivera as well as interviews with other witnesses. (RT 497.) Before the interview began, one of the detectives said within earshot of petitioner, something to the effect of "What do we have here; We are going to question a suspect." (RT 11.) For the first part of the interview, petitioner explained what he had been doing the day and evening of the shooting. (AI 2-19.) When petitioner concluded his description of the events of the day without mentioning the shooting, the following exchange took place:

Detective.: Okay. We did real good up until this point and everything you said it's pretty accurate till this point, except for you left out the shooting.

Petitioner: The shooting?

Detective: Uh huh, the shooting.

[18] Petitioner: Well I had never seen no shooting.

Detective: Well, I'm afraid you did.

Petitioner: I had never seen no shooting.

Detective: Well, I beg to differ with you. I've been told quite the opposite and we have witnesses that are saying quite the opposite.

Petitioner: That I had seen the shooting?

Detective: So why don't you take a big deep breath, like I told you before, the very best thing just to be honest. I don't have three notebooks full of notes because I haven't been talking to people and there's no way you can have this many people involved in something like that and people making deliveries, the delivery trucks making deliveries, people sitting in donut shops doing things and your group and everybody is not going to lie about this, okay? You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted, if it was maybe one person you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is that they have told the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way farfetched different.

Petitioner: I don't remember ever seeing the shooting. I never saw uh, where anyone was shot or --

I had know it was between the Yoshinoya, it was by the Yoshinoya and the dumpster.

Detective: What about the fact that you were standing there when it was decided to go up to the truck and you went up on the uh, passenger's side of the truck? Now I don't think you had any intention of anything happening and I don't think it was your intention at all for that man to get killed. I think that was the last thing you thought was going to happen. When it did happen, it was like, oh shoot. I want to get out of here. As a matter of fact, I'm so certain that you didn't want anything to happen when you went up to truck. You were kind of ducking behind the truck on that side, hiding, cause you didn't really want to be up there, but you were. I think maybe you weren't thinking clearly. I think maybe you made some bad decisions cause you weren't thinking [19] clearly that night and I know that's not what you intended to happen, by any means. You don't seem like that kind of a man. How much did you have to drink? (AI 19-21.)

* * * * *

Detective: . . . This is when it gets really tough. You've got to make some very tough decisions here about being honest and taking care of yourself and what's going to happen to you. This isn't the time that you need to worry about finking or ratting off or whatever you guys call it these days, on

your friends, okay? The people that shot that old man are not your friends. They put you in a bad position, so you don't owe them anything, okay? They got you in this mess, you don't owe them anything. The only person you owe anything to is yourself cause a friend would not have gotten you in that position and I know it's very difficult when it comes time to have to drop the dime on somebody and say, well it was so and so, but so and so that killed that man is not your friend and if that had been your parent, your mother, or your brother, or your sister, you would darn well want that person to go to jail cause no one has the right to take someone's life like that. You don't owe that person anything and I already know as much as I do and I probably know who was on that side of the truck, but what I'm looking for is to see if you'll tell the truth. I didn't get everyone's picture gathered up here just by accident. So was it Manny out there? Desmond? (AI 22.)

* * * * * *

Detective: . . . The main thing you need to be worried about is just taking care of yourself. You're nodding your head. Does that mean you understand?

Petitioner: Yes.

Detective: Okay. This is a not a pleasant thing for anybody. And that's when we sat down

> and I said all I wanted was the truth. That I pretty much already knew 95% of this and what I was hoping is that you would be honest. It's very difficult to admit when you've made a mistake like this, okay? And none of us like to have to admit when you made such a bad mistake. . . . So now let's start with the truth. . . . (AI 24-25.)

At this point, petitioner began making self-incriminating [20] statements about what took place just before and after the shooting. After petitioner concluded with his most self-incriminating statements, the detective asked petitioner about where he would be going after the interview:

> Detective: When we're done here today were you, you going to go back home or to your grandmother's or --
>
> Petitioner: I'll be going back home.
>
> Detective: You go to work today or --
>
> Petitioner: No I have to go to Town Center. . . . (AI 33.)

Petitioner was, in fact, allowed to go home after being questioned.[28/] (RT 501, AI 61.) Petitioner surrendered himself

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28. The most likely explanation for why petitioner was not arrested immediately after his interrogation was that the detective realized

to the sheriff's station two months later when the detective notified his parents that a warrant had issued for his arrest. (RT 501.)

B. Miranda Warnings Are Required When A Person Interrogated by the Police is "In Custody"

The appellate court's finding that under these circumstances any reasonable person would have felt he or she was free to leave is not an accurate depiction of real life and is contrary to numerous federal and state cases defining custody. It has long been the rule that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . [21] . ." (Miranda v. Arizona (1966) 384 U.S. 436, 478-479 [86 S.Ct.

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petitioner's statements would not be admissible against him because she had not given petitioner his Miranda rights. To cover this egregious violation of petitioner's constitutional rights, the detective let petitioner leave with his supportive parents, thus belatedly attempting to demonstrate that petitioner was not "in custody," while knowing with a high degree of probability that petitioner would be available through his parents to be arrested at a later date.

1602, 16 L.Ed.2d 694].) "The warning mandated by Miranda was meant to preserve the privilege during 'incommunicado interrogation of individuals in a police-dominated atmosphere.' [Citation omitted.] That atmosphere is said to generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" (Illinois v. Perkins (1990) 496 U.S. 292, 296 [110 S.Ct. 2394, 110 L.Ed.2d 243] [quoting Miranda, supra, 384 U.S. at pp. 445, 467.) The purposes of the Miranda safeguards are "to ensure that the police do not coerce or trick captive suspects into confessing [and] to relieve the 'inherently compelling pressures' generated by the custodial setting itself, 'which work to undermine the individual's will to resist'. . . ." (Berkemer v. McCarty (1984) 468 U.S. 420, 433 [104 S.Ct. 3138, 82 L.Ed.2d 317] [footnotes omitted].)

"Custody" means "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (People v. Boyer (1989) 48 Cal.3d 247, 271 [citing California

v. Beheler (1983) 463 U.S. 1121, 1125 [103 S.Ct. 3517, 77 L.Ed.2d 1275].) The relevant inquiry in determining whether a person was in custody during police questioning is "whether a reasonable person in defendant's position would have felt he or she was in custody." (People v. Stansbury (1995) 9 Cal.4th 824, 830 [citing Berkemer, supra, 468 U.S. at 442].) To assess the question of custody, a reviewing court must consider the totality of the circumstances. (Boyer, supra, 48 Cal.3d at p. 272.)

Over time, the courts have considered numerous factors in assessing whether a person was "in custody" for Miranda purposes at [22] the time he was subjected to law enforcement questioning. These factors include:

> whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether

police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. (People v. Aguilera (1996) 51 Cal.App.4th 1151, 1162.)

[23] No one factor is dispositive. (Boyer, supra, 48 Cal.3d at p. 272.) In petitioner's case, the balance of factors suggests strongly that petitioner was, from an objective standpoint, subject to such a restraint on his freedom that Miranda warnings were required prior to, or at least during, the interrogation.

C. The Totality of the Circumstances Suggest that Petitioner was in Custody for Miranda Purposes at the Time He was Interrogated by the Homicide Detective

Petitioner's situation is similar to the situation in Aguilera, supra. The defendant in Aguilera was one of a number of "Norteo" Hispanics who rode in caravan that was harassing "Sureo" Hispanics. (Aguilera, supra, 51 Cal.App.4th at pp. 1156-1157.) After several confrontations between the two groups at different locations, a man sitting in a car in a Sureo neighborhood was shot to death. (Id.) At trial, the prosecution admitted statements made by the defendant that acknowledged that he had participated in the caravan, that he was aware that one of the other caravan members had a gun, and he was present when the man was shot by a caravan member. (Id. at p. 1158.)

The defendant was convicted of several offenses including involuntary manslaughter. (Id. at p. 1155.)

On appeal, the defendant challenged the admission of his statements because they were involuntary and obtained in violation of Miranda. The investigating officers learned from interviewing another caravan member that the defendant had participated in the caravan. The officers went to the defendant's home and asked the defendant and his mother if the defendant would come to the police station to talk about the homicide. The officers said they would return the defendant to his house. The defendant and his mother agreed and the officers [24] brought the defendant to an interview room at the police station.

The subsequent interview lasted two hours. At the outset, one officer told the defendant he was not in custody, but she also explained that defendant would not return home until they were finished and the defendant had told the truth. The officers also told the defendant that they knew what had happened, they

knew who was present, and they knew who had done what. When the defendant denied any involvement, the officers accused him of lying, told him not to play games, and confronted him with evidence --both real and contrived-- of his involvement. When the defendant continued to deny his involvement, the officers said that the truth might exculpate him but continued lies would probably lead to murder charges. The officers told the defendant to think about all he would miss if he went to prison and used references to both the victim and the defendant's mother to urge him to tell the truth. The defendant maintained his denials and the officers maintained the pressure on the defendant. Eventually the defendant changed his story and made statements implicating himself in the events the night of the shooting. At the end, the officers returned the defendant to his home.

On appeal, the court found that the circumstances demonstrated that the defendant was in custody and should have been given Miranda advisements. (Aguilera, supra, 51

Cal.App.4th at pp. 1163-1164.) The court noted that although the officers said the defendant was not in custody, they also said the defendant would not be brought home until he told the truth. Based on the officers' repeated assertions that the defendant was lying, it would have appeared to the defendant that [25] he could not go home until he gave the "truth" the officers were seeking. (Id. at p. 1164.) The officers never told the defendant he was free to leave nor did the defendant's actions during the interview suggest he was aware of his personal rights. (Id.) Moreover, the officers were not interviewing the defendant merely as a witness. They made it clear that he was a potential suspect and that they had evidence to prove his involvement. (Id.)

In assessing the manner of interrogation, the Aguilera court observed, "courts consider highly significant whether the questioning was brief, polite, and courteous or lengthy, aggressive, confrontational, threatening, intimidating, and accusatory." (Id.) The court found that the defendant's "'tag

team' interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee, and except for a Miranda advisement, we cannot conceive how defendant's interrogation might have differed had he been under arrest." (Id.) The court concluded, based on the totality of the circumstances, that at least at the time the defendant began to change his story, if not before, a reasonable person would have felt deprived of his liberty in a significant way and was suffering a degree of restraint akin to an arrest. (Id. at p. 1165.)

The circumstances of petitioner's case are remarkably similar to the circumstance in Aguilera and lead to the same results. In petitioner's case, the detective contacted petitioner's parents with [26] whom petitioner was living and said that she needed to question petitioner. Petitioner was subsequently brought to the sheriff's station by his father. Thus, while

petitioner's presence was voluntarily in the sense that he came to the station with his parents rather than with law enforcement, a direct appeal to a minor's parents is more aptly described as "coercive" rather than "voluntary". In addition, petitioner was questioned in an interview room at the sheriff's station for two hours. Petitioner's parents who requested to be present at the interview were kept outside in the lobby for the duration of the interview. The tone of the questioning is best described as calmly accusatory. The detective was polite yet she made it abundantly clear that she knew petitioner was lying and that petitioner was more involved in the shooting then he initially admitted. Indeed, the detective told petitioner that she had been interviewing witnesses and knew all about what had taken place that night. A reasonable 17-year-old with no prior experience with being questioned by law enforcement would most likely believe that if he is at a police station being questioned by a police officer and the officer is stating repeatedly that he is lying and he is being cajoled to tell the truth, that he is not free to get

up and leave, at least not until he has satisfied the officer's desire for the "truth".

This belief was likely reinforced because the detective never told petitioner that he was being questioned as a witness, nor did she tell petitioner he was free to leave at any time. While the detective did ask petitioner where he was going after the interview, implying that petitioner would be free to leave, she did so only ***after*** petitioner had already offered up his most self-incriminating [27] statements. Similarly, the detective offered petitioner water, a bathroom break, a pager break only near the end of the interview, again after petitioner had made his most self-incriminating statements.[29/] (AI 51.)

The circumstances of petitioner's interrogation were markedly different than the circumstances in Oregon v. Mathiason (1977) 429 U.S. 492 [97 S.Ct. 711, 50 L.Ed.2d 714],

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29. Interestingly, during the tail end of the interview, the detective displayed her police gun for petitioner ostensibly so he could use her gun as a reference to estimate the relative size of Soto's gun. (AI 59.) A display of a gun, regardless of the circumstances, involves subtle and not so subtle reminders of the restraints on one's freedom.

which the trial court relied upon in denying petitioner's pretrial motion to suppress his statements. (RT 14-15.) In Mathiason, a police officer investigating a burglary asked Mathiason, a parolee, if they could meet and discuss something. (Mathiason, supra, 429 U.S. at p. 493.) Mathiason agreed and did not object to meeting the officer at the police station. When the two met, they shook hands and the officer told Mathiason he was not under arrest. (Id.) The officer told Mathiason that he wanted to talk with him about a burglary and that his truthfulness might be considered by the prosecutor or judge. (Id.) Mathiason admitted his guilt within the first five minutes of the meeting after the officer told Mathiason that they believed he was involved and told him, falsely, that his fingerprints were found at the scene. (Id.) Mathiason was subsequently Mirandized, made a taped statement, and was released to go home after being told that the officer was referring the case to the district attorney. (Id. at p. 494.)

In finding no Miranda violation, the Mathiason court emphasized that Mathiason came to the police station voluntarily and was told [28] immediately that he was not under arrest. (Id. at p. 495.) In addition, the interview lasted only a ½-hour and Mathiason was allowed to leave at the end. (Id.) The Court emphasized that the fact that a person is questioned at a police station or is questioned because he is a suspect does not signify restraint on a person's freedom. (Id.)

Petitioner's situation was different. Petitioner was a minor with no prior experience with the police. Mathiason was a parolee. Petitioner was brought to the sheriff's station by his parents after the homicide detective told his parents she needed to talk to him.[30/] Mathiason came to the police station after talking with the police and agreeing to do so. Petitioner was questioned for two hours. Mathiason admitted his guilt within five minutes and was released within 30 minutes. Petitioner denied any involvement in the shooting incident and was

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30. Petitioner's parents did not knew any details about why the detective needed to speak with appellant. (AI 53.)

subjected to a series of psychological ploys geared towards getting petitioner to "tell the truth." While petitioner sat there silently, the detective engaged in prolonged monologues about the "truth" and about how she already knew the details of petitioner's involvement.

Much like the defendant in Aguilera, supra, petitioner was essentially undergoing a post-arrest interrogation without the arrest. "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." (Miranda, supra, 384 U.S. at p. 455.) Nevertheless, at no point in the interrogation did the detective take "appropriate safeguards . . . to insure that [petitioner's] statements were truly the product of [29] free choice." (Miranda, supra, 384 U.S. at 1619.) At a minimum, the detective should have given petitioner Miranda warnings and obtained proper Miranda waivers before she began her incessant push for the "truth." The detective's failure to do so violated

petitioner's Fifth Amendment right not to incriminate himself and rendered his statements inadmissible.

D. The Erroneous Admission of Petitioner's Statements Was Highly Prejudicial

Without question, the admission of petitioner's statements to the homicide detective was critical to the prosecution's case. Even when the remaining evidence is examined in the light most favorable to the prosecution, there is virtually no evidence that petitioner aided and abetted a planned robbery. The remaining evidence demonstrated only that petitioner was on the passenger side of the truck at the time of the shooting. Petitioner's attempted robbery and murder convictions could not be sustained without petitioner's incriminating statements. The statements, however, were inadmissible. Accordingly, petitioner's convictions must be reversed.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 21 day of February, 2000 at Ione, California.

/s/
MICHAEL ALVARADO

[30]

PRAYER FOR RELIEF

Petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have petitioner brought before this Court so that he may be relieved from his unconstitutional confinement and restraint;

2. Conduct an evidentiary hearing at which proof may be offered concerning any contested allegations in this petition;

3. Order, upon final review of this petition, that petitioner's conviction and sentence be set aside;

4. Grant such order and further relief as the Court may find appropriate in the interests of justice.

Dated: February 21, 2000 Respectfully Submitted By:

/s/
MICHAEL ALVARADO

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TUESDAY, OCTOBER 24, 1995; 1230 HOURS

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STATEMENT OF **MICHAEL ALVARADO**

taken at Pico Rivera Sheriff's Station in the presence of Investigator **CHERYL COMSTOCK**, Los Angeles County Sheriff's Department, Homicide Bureau, Detective Division. Investigation under File No. 095-20808-0443-011. Transcribed by Cecilia Arzate, Word Processor II.

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COMSTOCK: Okay today's date is October 24th, 1995.

The time is approximately 1230 hours. This is Investigator Cheryl Comstock from the Sheriff's Homicide Bureau conducting an investigation under file number 095-20808-0443-011 and I'm currently at Pico Rivera Sheriff's Station interviewing Michael Alvarado, who was brought into the station after I left word at his family's house that I needed to speak with him. I then contacted his mother, Maria Alvarado, at her work, the post office in Pico Rivera and she had informed me that her husband, Mr. Alvarado was bringing to the Pico Rivera Sheriff's Station so I could interview him. Both Mr. and

Mrs. Alvarado are currently in the lobby at the Pico Rivera Sheriff's Station and have given permission for me to interview their son, Michael Alvarado. Alright Mike why don't you just, for the most part, try and just ignore the tape recorder and just talk in a normal voice --

A Okay.

Q -- and uh, just state your name for the record.

A My name is Michael Alvarado.

[2] Q Okay. Alright now before I turn the tape on, we talked just briefly about the murder at the Santa Fe Springs Mall, Promenade Mall, and and uh, basically what I'd like you to do, you know that that occurred on a uh, late Friday night, early Saturday morning, it was September the 23rd of this year and uh, do you remember that Friday?

A Yes I do.

Q Do you remember where, if you went to school that Friday?

A Uh, no I don't have sch -- I don't attend school. I have home studies at the time.

Q Okay do you know what you were doing that Friday, late afternoon?

A That Friday uh, I had come from Town Center Hall in Santa Fe Springs on Telegraph.

Q Who were you with?

A Uh, my friend Manuel Rivera.

Q Town Center Hall, what were you guys doing there?

A Yes, it's a, like a teen club and we go over there sometimes after school and play some video games and meet our friends and talk and re -- relax.

Q And you were there with uh --

A I was there with one of my friends and I met him right after school.

Q And his name is?

A Manuel Rivera.

Q Manuel?

A Yes.

[3] Q Rivera?

A Yes.

Q And how old is he?

A He's 17.

Q And what were you and he doing there at the mall?

A Oh just uh, at that time, it was maybe early afternoon and we were kind of, we were just playing pool uh, watching t.v. and then we had met up with another friends in there, just uh, talking, relaxing, 'kicking back' there and then we had left and went back to his house.

Q Were you drinking?

A Yes we were.

Q What were you drinking when you were at the mall?

A No, at -- not at the mall, when we had -- had gone back to his house.

Q So at the mall you were playing games, video games?

A Yes, we were playing pool.

Q And you didn't have anything to drink at the mall?

A Nah, uh, nothing.

Q What time did you leave the mall?

A Uhm, it was maybe around 6, a little before 6 maybe.

Q P.M.?

A Yes.

Q And who left?

A It was me and my -- Manuel and at that time, there was another, there was two females with us.

Q Know their names?

[4] A Yes, one of them is uh, Toni Brazulto or Brazu -- Brazulto --

Q Uh huh.

A -- and another girl was Sonia, Sonia, Sonia Rios, something like that.

Q Rios?

A Yes.

Q And whose friends were these?

A Well uhm, one of them was my friend and then the girl Toni was mine and my friend Manuel's friend and we were getting to know Sonia.

Q Okay. Let's see here. Is this here uh, one of the girls, Sonia?

A Yes.

Q Okay and is this --

A That's Manuel.

Q Okay, what I'm showing you is the uh, year book photographs of Sonia Rios and Manuel Rivera. Okay, okay and then what did the four of you do?

A Uh, we went to my friend Manuel's house, which is about maybe five minutes from Town Center. We, all of us had walked over --

Q Okay.

A -- and for a while we were just sitting in the house, watching t.v. and just sitting on the couch and everything like that.

Q Were his parents home, Manuel's parents?

[5] A Uh, I believe his mother was home at the time when we first gotten there.

Q And it was still just the four of you?

A Yes.

Q And then what happened?

A And then we were just re -- we were there about maybe the whole night and back and forth, using the phones well 'cause their phone uh, they ran the bill too high, so they didn't have -- their phone was disconnected, so we'd walk back and forth maybe about three, two or three times during the night, during the afternoon, going back and forth, using the phones to call whoever we wanted to call and then uh, later a couple more friends had came over.

Q Who was that?

A Uh, it was Valerie -- Valerie Garcia and I, the other, I know his first name, his name is Desmond --

Q Uh huh.

A -- and then there was another guy I had never seen before.

Q Okay, so time did these individuals show up?

A Uhm, must have been around 8:30, 8, 8:30, 9.

Q So it's Valerie Garcia uh, with someone named Desmond?

A Yes, I don't know their last names.

Q And another individual with them?

A Yes uh --

Q Did you --

A -- a --

[6] Q -- remember hearing his first name?

A -- a male. No, I don't hear any names for him?

Q Did you hear a nickname for him?

A No.

Q No?

A He was never -- I've never seen him before, I never met him before nothing. He was just somebody that the other two people had brought.

Q Let's see here. Is this the same Valerie Garcia you're speaking of?

A Yes.

Q Okay. I showed you a year -- a school book color photograph of a Valerie Garcia and then Desmond, not Desmond, excuse me uh, yeah Desmond uh, is this the individual?

A Yes that's him.

Q Okay I'm showing him a color Polaroid photograph that was taken uh, by myself of Desmond Pacheco. Is this the first time you had met Desmond?

A No, I've met him a couple of times before, but it was like uh, he was friends with maybe other people I was with at the time.

Q Okay and then, now what I'm showing you is a, we call it a mug -- mug uh, show-up folder and it's a number A for recording purposes here. I want you to just look at the photos of these individuals and see if you recognize any of the photographs of this -- uh, one of the individuals that you're speaking of, that was, other person with Valerie and Desmond, keeping in mind that the idea of looking at photographs is to [7] exonerate or to clear people of charges or to determine that they may be involved in something. Also keep in mind that the photograph maybe not be a new one, so it may look different. Like I'm sure when your hair is growed out, you look different, so a photo of you with hair versus now, with a shaved head, you look different, okay?

A Somewhere between these two, between the two and six.

Q Between two and six?

A Yes, because the -- the other one was wearing a hat. He had an all black hat on that night.

Q Okay, why don't we cover up the forehead of number six.

A Number six.

Q Okay, so after --

A That's it --

Q -- covering up the forehead of number two and six, you've determined that number six is the other individual? Okay. And you don't recall what he was introduced, as far as his name?

A Nah, I -- I was never introduced to him.

Q Okay. Okay. Alright so now around 8, 8:30, or 9 p.m., Valerie Garcia, Desmond, and an unknown male show up at the, at Manuel's house?

A Uh huh.

Q Were they invited over?

A Uh, I think Valerie was because it was Manuel's house, so he was really like telling people, you know, okay you can come whenever you can, and I -- I'm pretty sure that

[8] Valerie was and Manuel, Desmond, and -- yeah, well Manuel really never liked Desmond, so I don't think Desmond was invited and the -- the last man uh, I think they said he was walking home and they had met him or that they -- he had gone up with them and asked them where they were going, so he had tagged along with them.

Q Okay and this was the unknown male?

A Yes.

Q Okay so then all of you group up at Manuel's house and what happens then?

A Oh we were just uh, 'kicking back' in his room, listening to the radio, pretty much just, everybody's just sitting around.

Q Okay so we have, when you got there, who was there besides you and Manuel? Was there anyone else already there?

A It was me, Manuel uh, the two girls, Sonia and Toni, and I believe Manuel's little brothers were there now, they, but they were in and out of the house --

Q Okay.

A -- playing and so forth and uh, by that time I think Manuel's step-father was home or he had been somewhere else in the house --

Q Uh huh.

A -- and then it would be Valerie and then Desmond and then the other male and then it wasn't for a while that uh, another two girls arrived.

Q Okay. At --

A Uh --

[9] Q -- anytime was there another guy there?

A No, I remember been just -- just four guys.

Q Okay. Do you know an individual with the last name of uh, Romero uh, first name of Jason?

A Jason, yes. Well I don't remember him being there. I remember him going -- when -- when uh, after Valerie and all of them got there, they were going inside and Jason had come to the back gate --

Q Okay so --

A -- and then --

Q -- Jason comes in to play later on?

A Yes.

Q Okay. I - I just --

A I think he arrived after.

Q Okay, with -- when -- 'cause when so many people at the -- at the house, I know it's hard to keep 'em straight, that's why I wanted --

A Uh huh --

Q -- to make sure you weren't --

A -- I wasn't sure who had arrived because when Manuel, it was his house, so he was answering the doors and --

Q Okay. Alright so at this point, it's all of you with the exception of Jason 'kicking back' in Manuel's room --

A Yes.

Q -- and then what are you guys doing in Manuel's room?

A Well after a while somebody had borrowed money and then they went and bought drinks and then some people were [10] drinking and then we, all of us, maybe about half of us had drinks.

Q What kind of drinks?

A Uh, the Budweiser like 40 ounce and I think there was a couple of Boone's, you know the Strawberry Hill wine.

Q Okay and uh, liquor?

A At one time uh, I think it was Manuel who brought it in, it was uh, a little container, it was -- it was a Arrowhead bottle of water and uh, it was Vodka, but I think like one person took a drink out of that and nobody wanted to mess with that all night.

Q And it was in some kind of water bottle?

A It was an Arrowhead, a small kind of a plastic containers.

Q And then what happens?

A Uh, we were there for a while and then uh --

Q Any marijuana?

A No. I don't think there was any.

Q I mean it's okay. I mean it's, the worst of --

A There was -- there was a uh --

Q I, in other words, I don't condone it, but if we -- if you guys were smoking it, let's just be up front with it.

A -- there was a -- there was a 'bong' there --

Q Uh huh.

A -- but uh, I mean I -- all I remember it was just sitting there that -- that night.

Q Okay.

A They were smoking cigarettes.

[11] Q And the 'bong' is the pipe, black thing that you put the --

A Yes what you smoke --

Q Okay.

A -- marijuana.

Q So unknown if anybody was smoking marijuana?

A No, I don't remember seeing anybody even having any.

Q Okay. Okay then what happens?

A Uh, and then I believe there were two -- two other girls that come and they were Regina, I don't -- I don't know Regina's last name and uh, Salina and I think they come in Salina's car.

Q Uhm, okay. Uhm, showing you another group of year book photos here, is this Salina here?

A Yes.

Q Okay. And Regina I do not have a picture of her, but it was Regina and Salina?

A Yes.

Q About what time?

A They -- they were the latest ones all night, but I'm not sure what time they had gotten there.

Q Uh, could you give me an approximation?

A Maybe uh, 10, 9:30, 10. I think they had gotten out of work a little while before that, come over and stop by.

Q And you said you thought they were in Salina's car?

A Yes I think they were in Sali -- they came in Salina's car.

Q Were you -- are you sure of that or is that just a --

[12] A No, well --

Q -- possibility?

A -- 'cause Salina's the driver, I don't think Regina has a license or a car.

Q But you didn't see how they arrived?

A No.

Q Alright and then what happened?

A Uh, we were all there for a while and everybody got -- started getting bored, so uhm, for the -- the main part of the group uh, Valerie and Desmond and the -- the other male and uh, Gina and Salina, this was later, this was maybe 11, 12 and uhm, I think Valerie had to use the phone uh, just Salina and

Gina had left and Desmond and the rest of them had stayed, but they all walked to the phone and so --

Q Do you know where Salina and, when you -- you say Gina you mean Regina?

A -- Regina.

Q Do you know where Salina and Regina went when you said they left?

A I think they went home because when they left there, I didn't walk them out or anything. When they left, I'm assuming that they just went home.

Q Okay, go ahead.

A And uh, the girls had went to the phone and the -- the guys wanted to go with them and uhm, Desmond and Sonia were in and out of the house maybe a couple of times, walking around and --

Q Were they with each other that night?

[13] A I have no idea.

Q So Desmond and Sonia were in and out of the -- the house?

A Yes, maybe like once, twice, they went for a walk and I believe it was either Regina, one of the girls had gotten paged, a couple of them that gotten paged, so they went to go use the phone at Jax Market and they were out there for a while.

Q Which girls got paged?

A Uh, I believe it was Valerie and Regina.

Q Okay.

A And they had left to the phones at Jax Market --

Q Okay.

A -- and the rest of us were still inside the house.

Q Okay then what happened?

A Uh, I believe at that time, that's when uh, Salina and Regina had left because they never made it back to the house and Valerie and Desmond and the, everybody had come back to the house and everybody was talking about leaving and all, going home and --

Q So Valerie, Desmond came back, but Regina and Salina did not?

A No, I don't remember them coming back.

Q How about Sonia, did she come back with Desmond?

A Yes she -- she finally came back.

Q But Salina and Regina did not?

A No, I don't -- I don't remember them coming back after -- after a while.

[14] Q Okay.

A And then the -- the rest of us we were just inside the room and there's really nothing to do uhm, and then it got -- it got a little later and everybody had to find a way to get home and -- and uh, so -- everybody started going back to the phones. The -- the male that had -- that was -- that I didn't know and Desmond and Valerie and they had all went back to the phone and there was me, Manuel, Sonia, and Toni, I believe we're still at the house and we were just uh, doing anything, cleaning up and just getting ready to go to bed and uhm, we had gone back

and then I believe Toni and Sonia they had went to Sonia's house, well they were going to walk, then they got a ride home from Manuel's uncle, way down there, maybe around 11:30, 12, 12:30 and he had come in a -- in his Honda. I --

Q Did he --

A -- I don't know where he was coming from though.

Q What time was it when he took Sonia --

A When he took --

Q -- and Toni home?

A -- them, maybe around 12:30 I think.

Q And his name is?

A Uh, I only know him by his first name and that's Alex.

Q And that's Manuel's uncle?

A Yes.

Q So around 12:30 a.m., Manuel's uncle, Alex, drove Toni and Sonia home?

A Yes.

[15] Q Did anyone else go with them?

A Manuel, Manuel went with them.

Q Alright. And then what happens?

A And I stayed at the house and uh, all the remainders of the people who were there, we were all waiting at the house because Manuel had asked me not to leave them there. I wanted to go home, but Manuel had asked me not to leave the people at -- at his house when he wasn't there, so the rest of us stayed in the room and Manuel got back, they left to the phone and Manuel --

Q Hold on a second, excuse me. Okay, so it's you and who else was there with you while Manuel is taking --

A There was --

Q -- the girls home?

A -- me and uh, Valerie had come back to see if any -- if any of us knew a way she could get home uh, I believe Desmond came back with her and uh, the unknown male was like by the back gate in the backyard.

Q And how about uh, Jason?

A Jason had left -- Jason had left early. He was on uh, I think his parents put him on restriction so he was -- he left early. He left -- he came maybe 8, 8:30, was there for maybe about a half hour, an hour and then he had walked home and we -- we were waiting in the room for Manuel to come back. It took Manuel maybe about 20 minutes, 25 minutes to drop both girls off, one in Whittier and one in -- in Santa Fe Springs.

Q Uh huh.

[16] A So he came back uh, the other people finally had left. Me and Manuel started cleaning then Manuel wanted to go call Toni, the one -- the other females that was there earlier that night.

Q So what were Valerie and Desmond and this unknown male doing while you and Manuel were cleaning up the room?

A Oh, well while we were cleaning up, they -- that's when they decided to leave. They were going to go call uh, somebody's friends for a ride or to see how they could get home.

Q So the others decided to leave and go call for a ride home?

A Yes.

Q Do you know who they were going to call?

A No I don't. They left -- they just said they were going to go use the phone and try to find a ride home.

Q Alright.

A And me and Manuel stayed at the house. After a while, I guess, we had changed and everything and we went back to the phone and uh --

Q Why did you change?

A Oh, we just put on like shorts or something and then 'cause we were -- we didn't know if we were going to go back out, so and then we got dressed again, put on our pants whatever and then we went back to the phone and Manuel -- Manuel was going to call Toni and then we had seen Valerie, Desmond, and other male there gain and they was -- they were stranded right there by the donut shop.

[17] Q So after the group left, leaving just you and Manuel, you changed into more casual clothes --

A Yes --

Q -- 'cause you were going to stay in?

A -- we're like uh, yes. I had finally decided just to spend the night.

Q Was it your bed clothes, what you would have slept in?

A Nah, I just had a pair of shorts.

Q But then Manuel decided he wanted to call Toni?

A Yes, he -- he wanted to call Toni.

Q So you put your pants back on and what'd you do?

A And then we walked out of the back of his house and walked by the cleaners and KFC and went around the corner to use the phones at Jax.

Q So when you got to the pay phones, what happened?

A Uhm, well we were using -- well Manuel was using the phone and we were just right there and I was waiting for

him. He stays on the phone for a while and uh, I had seen the other male, Desmond, and Valerie by the donut shop and --

Q So --

A -- they were just stranded there.

Q -- when you two walked up, Valerie, Desmond, and the unknown male were hanging around the donut shop?

A Yeah, they were by uh, they were all sitting down, they were, Valerie was -- they were all waiting for a ride, a way to get home, when we had got there, they had asked me uh, if we knew a way to get home and everything like that.

[18] Q Don't they all live within walking distance of there?

A I believe Valerie does, maybe she could walk home within 15, 20 minutes uh, Desmond leaves -- Desmond lives maybe about five, 10 minutes away, but I don't know his purpose for still being there and the other male, I -- I have no idea where he lives or anything, if he lives close enough to walk.

Q And they were sitting by the donut shop?

A Yes, by, close to the phones, by the donut shop, in between the market and the donut shop, there's a little planter right there and they were sitting on the railing.

Q Okay go ahead, then what happens?

A And uh, Manuel had got off the phone --

Q So Manuel did call Toni?

A Yes, I -- I -- I'm pretty sure he called Toni because when he went to the phone I looked for something else to do 'cause he's on the phone for a while, so I was talking to Valerie and Desmond.

Q So you think he called Toni?

A Uh huh. I -- well I wasn't too sure when -- who he -- who he had actually called, but when we were in the house, I believe he wanted to call Toni.

Q Then what happened?

A Then uh, Manuel got off the phone and then we were all talking maybe for a couple of minutes or so uh, the uh, the

rest of them had walked back, they all started going back to Manuel's house.

Q So then Manuel got off the phone, did he group up with you and the other three people?

[19] A Yeah, we were all kind of like around, close to each other, talking and everything.

Q And where were you standing around talking?

A Uh, I was closer by the phones and then we moved close by the, where they were sitting at, between the donut shop.

Q By that planter?

A Yes.

Q And then what happened?

A And then we -- we went back to Manuel's house after he got off the phone and me and Manuel were the last ones, we walked back, and the rest of the group, they went back to the house, through the back gate and then I had went back to the house and we were in the house maybe for about five, 10 minutes, and then Valerie and Desmond had left first, walking,

and then Paul, I think he went to the rest room and then he had left, walking out the front door and me and Manuel just stayed there and changed --

Q What'd you do after that?

A -- and then we had -- and then we just went to bed.

Q Okay. We did real good up until this point and everything you've said it's pretty accurate till this point, except for you left out the shooting.

A The shooting?

Q Uh huh, the shooting.

A Well I had never seen no shooting.

Q Well I'm afraid you did.

A I had never seen no shooting.

[20] Q Well I beg to differ with you. I've been told quite the opposite and we have witnesses that are saying quite the opposite.

A That I had seen the shooting?

Q So why don't you take a big deep breath, like I told you before, the very best thing just to be honest. I don't have three notebooks full of notes because I haven't been talking to people and there's no way you could have this many people involved in something like that and people making deliveries did uh, the delivery trucks making deliveries, people sitting in donut shops doing things and your group and everybody is not going to lie about this, okay? You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is is that they have tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way far fetched different.

A I don't remember ever seeing the shooting. I never saw uh, where anybody was shot or -- I had know it was

between the Yoshinoya -- it was by Yoshinoya and the dumpster -- and the dumpster.

Q How about uh, the fact that you were standing there when it was decided to go up to the truck and you went up on the uh, passenger's side of the truck? Now I don't think you had any intention of anything happening and I don't think it [21] was your intention at all for that man to get killed. I think that was the last thing you thought was going to happen. When it did happen, it was like, oh shoot. I want to get out of here. As a matter of fact I'm so certain that you didn't want anything to happen when you went up to truck. You were kind of ducking behind the truck on that side, hiding, 'cause you didn't really want to be up there, but you were. I think maybe you weren't thinking clearly. I think maybe you made some bad decisions 'cause you weren't thinking clearly that night and I know that's not what you intended to happen, by any means, 'cause you don't seem like that kind of a man. How much did you have to drink?

A A little 40.

Q A little 40?

A A little 40 and then some of the Strawberry Hill.

Q Were you a little 'buzzed'?

A A little bit.

Q You look kind of stupid, not really sure what you were doing?

A No, I wasn't -- I wasn't, anything stupid or I was 'buzzed' and had the giggles and all that, but --

Q The only thing I want to be clear of, is who the uh, person on the driver's side of the truck was. I know it wasn't you. You didn't kill that old man, did you?

A Nah uh.

Q So now what we need to do is clear up whose on the other side of the truck. So the choices are Valerie, Desmond, [22] Manny, or the unknown male, 'cause I know you were on the passenger side, ducking down.

A I never really saw what happened on -- on the other side of the car.

Q That's 'cause you were ducking down, but you know darn well who was on the other side. This is when it gets really tough. You got to make some very tough decisions here about being honest and taking care of yourself and what's going to happen to you. This isn't the time that you need to worry about thinking or 'ratting off' or whatever you guys call it these days, on your friends, okay? The people that shot that old man are not your friends. They put you in a bad position, so you don't owe them anything, okay? They got you in this mess, you don't owe them anything. The only person you owe anything to is yourself 'cause a friend would not have gotten you in that position and I know it's very difficult when it comes time to have to 'drop the dime' on somebody and say, well it was so and so, but so and so that killed that man is not your friend and if that had been your parent, your mother, or your brother, or your sister, you would darn well want that person to go to jail 'cause no one

has the right to take someone's life like that and you don't owe that person anything and I already know as much as I do and I probably know who was on that side of the truck, but what I'm looking for is to see if you'll tell the truth. I didn't get everybody's picture gathered up here just by accident. So was it Manny out there? Desmond?

A No.

[23] Q The unknown male? Was it the unknown male?

A (Unint.)

Q Was it this guy here, number six? Do you know him? Has he threatened you?

A No.

Q What do you owe this individual then?

A Nothing.

Q Why would you want to protect him? Or is this --

A I'm not protecting that I want to do for him, just --

Q You don't want to have to admit the truth about you being out there?

A No, I was up there and I was in the side of the truck.

Q Then why are we finding it so difficult to protect a guy that you don't even know? Is it 'cause you don't want to get 'snitch jacket'? You're nodding your head, that means no I guess?

A Yeah.

Q Then -- then what is -- what is it? I would just like to know why you're --

A A different gang.

Q He's from 'Rivera' right and you're from 'Los Nietos'?

A Yes.

Q Has his gang threatened you?

A No.

Q Have you had any problems with gangs since then?

[24] A We don't get along. We haven't gotten along since then, even before that.

Q Well --

A It's just -- it's not 'cause I have -- it's not even the two different gangs, it's just -- just, I don't know.

Q Well this is not a gang situation. This is not 'Los Nietos' versus 'Rivera' and one of the guys from the other gang gets killed by the other guy, okay? This is something even more serious, not that that isn't serious, but this is a citizen who was minding his own business and gets killed, so uh, the fact that the guy in photograph six is from 'Rivera' gang uh, you just need to put that out of your mind and set it aside because that is not an issue here. It's not a problem. This isn't gang versus gang and I don't think he's in that good with the gang right now anyway, but that's, again, that's really not an issue you need to be worried about. The main thing you need to be worried about is just taking case of yourself. You're nodding your head, does that mean yes, you understand?

A Yes.

Q Okay. This is a not pleasant thing for anybody okay? And that's when I sat down and I told you that all I wanted was

the truth. That I pretty much already knew, 95% of it and what I was hoping is that you would be honest. It's very difficult to admit when you've made a mistake like this, okay? And none of us like to have to admit when you made such a bad mistake. You're nodding your head again, is that yes? Okay. The reason I'm saying that is because the tape recorder can't see you, [25] okay? So now let's start with the truth. We're doing very well up to the phone booth part and uhm, well all of the phone booths are the players still the same? It's you, Manuel, Desmond, Valerie, and this unknown male? Yes?

A Yes, it is, uh --

Q And Jason has honestly gone home?

A Jason had walked home earlier --

Q Okay.

A -- way earlier in the night.

Q Okay. And then what happens?

A Uhm, like I said earlier, they were 'hurting' for a ride home uh, I believe the unknown male, I -- I had never seen it all

night and I, nobody had told me and he never showed it, but he had gun on him. Uh, his idea was to -- uh, he had -- I don't know if he had any -- any intention to shoot the -- the man, but what he wanted was the truck. He wanted the man's truck, so they could get home and I have no idea, I have -- don't remember what I was thinking at the time to walk along the side of that truck, but when we went over there I had no intention of him hurting the man and, but we walked over there and I was just -- I was standing along the side of the truck and before I got -- when I got to a certain part of the truck I was looking through the window and so they were a little bit back and I couldn't really see what was going on and what I had guessed was the man had given uh, uh, put up a little fight or something, I -- I didn't even know if did that and then all I heard was the one shot and then I saw the man come to the car, after he was shot in the chest, he came to the car and hit the [26] car and I looked -- I looked back and everybody was already gone and running and I didn't know what to do. I was -- I was like well I had no

intention for that happening and I was like, well what do I do. I -- and then that's when I started going back to the house and then, then everybody else uhm, went into the house, Paul did to go use the rest room, and then he -- and then Valerie and Desmond had left first. They didn't even want to be anywhere around there. They left first, them two left out the front door, I think, walking and then the other male had followed, maybe five minutes behind and he took off walking and me and Manny let him out of the house and he took off and after that we never saw where he went.

Q When you said, you used the name 'Paul went into the bathroom,' --

A Uh huh.

Q -- was that the unknown male's name?

A That was him, the male.

Q Paul? You know his last name?

A Nah uh.

Q Do you know his street name, his gang name?

A I had kind of put two and two together when we were -- when we were at a park earlier that day and uh, there was him and another guy from 'Rivera' there and it said -- he's either uhm, 'Dopey' or 'Shy Boy.'

Q I believe his nickname is 'Dopey.'

A It was -- I know it's one of those two because --

Q 'Dopey' or 'Shy Boy'?

[27] A -- they were the only two from 'Rivera' there that day and -- and they had said two names from 'Rivera.'

Q Uh, when Paul went into the bathroom, why did he go in there?

A To wash off his hands and arm.

Q What did he have on him?

A The man's blood.

Q Did he have blood on his clothing?

A Uhm, I think he had blood on his shirt.

Q What did he do with that shirt?

A I believe he threw the shirt away. I believe the shirt was thrown away.

Q Do you know if he took it with him or threw it in the trash can at Manuel's or --

A No, he took it, I think we made him take it with him 'cause we don't want anything, his parents (unint.) --

Q When you first got back to Manuel's house, what did Paul do with the gun, when you first got into the bedroom?

A At first I think he hid it.

Q Where did he hide it?

A By, close by the dresser and then we had -- I had -- I think I had asked him or I don't know if Manuel had asked him first uh, where's the gun, where's the gun, and he said, I hid it, I hid it, it's by the dresser, over there by the bed, and this and that, so the gun -- the gun was taken and hidden at a park and then the next morning uhm, another one of his -- another one of 'Dopey's' 'homeboys' and Desmond had came back [28] and the 'Dop -- and then 'Dopey's' 'homeboy' went and got the gun.

Q Okay the following morning, being Saturday --

A Yes.

Q -- these people came to Manuel's house?

A Yes when me and Manuel were asleep.

Q You and Manuel were asleep and it was Desmond and who else?

A Desmond and uh, the other guy, I never seen him before --

Q But it was somebody --

A -- that's the first time I seen him.

Q -- from 'Rivera' gang?

A Yes.

Q And they came up to Manuel's door?

A Yes.

Q And did they talk to you guys?

A They talked to, I believe first Manuel's mother answered the door uh, Manuel -- Manuel then went -- they went and woke us up and said, there's somebody here at the door for

you. We went to the door uh, we told them where the gun was at and then they went and got the gun and then that was -- I haven't seen or heard of any -- I haven't seen or heard from uh, 'Dopey' or his 'homeboy' or Desmond or any of them.

Q Okay where was the gun?

A At uh, I think it's 'Little Lake,' the park uh --

Q Behind Santa Fe High School?

[29] A -- the school, no on the side, right there on the side of Santa Fe.

Q Yes.

A Uhm, by the church, right there.

Q Where, within the park?

A No, it was outside of it by the uhm, by the bushes, along the fence by, I think it was the front office.

Q And how do you know that's where it was?

A 'Cause we had taken it there.

Q Whose we?

A Me and Manuel.

Q What about Paul, what happened to him?

A He just -- he left.

Q He left the gun in the room?

A Uh huh.

Q He didn't take it with him?

A He left the gun at the house and then after he had walked out, we went to the room and me and Manuel were -- we were panicking, we didn't know what to do. We found the gun and then we -- and then we -- we're like, oh wow he left it, what do we do, do we -- I -- didn't know whether to keep it, inside here and then we just decided to get it out of the house.

Q Okay and Desmond, Desmond's a good friend of uh, Paul's?

A I don't know if they're good friends, but they were, see because when Valerie and Desmond came to the house uhm, they had, Paul had met up with them, Paul was walking home or [30] something and then he had met up with them and then he's -- he asked -- he cleared it with one of them, he said it's

okay if I go with you guys wherever you guys are going right now.

Q Okay well the reason I'm asking is -- is Desmond comes back the next day with a 'Rivera' gang member to go get the gun, so it would seem like Desmond's has a close connection with Paul.

A Well 'cause I know both of them, because Desmond when we were at the park earlier that day, that's how I found out that those two guys were from 'Rivera.' Desmond wasn't there with us and then, so I don't know how they met up with Desmond afterwards.

Q Is Desmond from 'Rivera'?

A No.

Q He's an associate?

A No. I -- I don't know if they have a relation or uh, relatives or --

Q Okay. And we're going to back track a little bit. We're up to the part when Manuel's on the pay phone with Toni, that's all pretty much straight, correct? Yes?

A Yes.

Q Okay and then Manuel gets off the phone and you guys are all sort of standing around, talking?

A Yeah, talking and just everybody's just thi -- trying to think of something to do and how to get home.

Q Okay. Did you go in the donut shop?

A No.

[31] Q How long after Manuel's off the phone, does Paul make the suggested about taking that truck?

A Maybe five, 10 minutes.

Q Okay. Do you recall anything happening prior to the pickup truck, that's what we're talking about, the pickup truck, right?

A Uh huh.

Q Prior to its stopping by the dumpster, do you recall it stopping before that and uh, Valerie contacting the man?

A I don't remember her talking to the man.

Q You don't remember her flagging him down, asking for some change or something?

A No. I just remember seeing him because I -- I never saw him which way I -- he came from the side and I never saw him and then he drove up on the side and then that's when they had -- that's when they had suggested it.

Q Okay so you didn't see Valerie --

A No, I don't -- I don't even remember Valerie flagging him down or asking him for change or anything.

Q Okay and I'm sorry, did you say you -- you did or did not go in the donut store and buy something?

A No, I don't never ever remember going -- entering the donut store.

Q Do you remember at anytime a small uh, well let me see, yeah do you remember a small Honda type car pulling up at the donut shop and talking to everybody?

A No. I remember a -- it had nothing to do with the, they didn't come and talk to us, but it was a -- a diesel truck [32] that had pulled in, a big rig and it pulled in by the donut shop.

Q And the diesel truck was there at the time of the shooting?

A Uh, I think he had pulled up just when they shot and then -- and then there was (unint.)

Q Okay. Okay, so after Manuel's off the phone for about five minutes?

A About five, 10 minutes.

Q What, if you remember, approximately what were Paul's words?

A Uhm, so do you want to go get a car or do you want -- do you want to find a ride home or --

Q And was he saying it to someone particular?

A Well he was saying that to, when he was saying it, he was saying it out loud and the group right there.

Q So he didn't say uh --

A No he --

Q -- Desmond or he didn't address it to anybody, just to the group?

A No, he said it to the -- yeah, to the group speaking out loud.

Q And then what was said?

A Uhm, and every -- and then I don't remember anybody's answers or I don't remember anybody answering like uh, if I remember correctly, everybody just stood like quiet, like oh well uh, I don't know uhm, and then we -- and then uhm, he had gone within uh, he never ask -- he never like, really asked me [33] just, you know, oh you want to go and then uhm, he's all, well are you going to go with me or -- who's going to go with me, who's going to go and watch out and, something like

that, and so I went and then that's when I went on the other side and he went to the driver.

Q When he made the statement about something to the effect of uh, you want to go get a car, you want a ride home, was he indicating in some manner the pickup truck?

A Yes because the -- the man in the -- the pickup truck was out of the car and sort of into the dumpster, getting off the -- the cardboards.

Q Was Paul looking in that direction or pointing at the pickup truck or --

A He was looking in that direction.

Q When we're done here today were you, you going to go back home or to your grandmother's or --

A I'll be going, back home.

Q You got to work today or --

A No, I have uh, I have to go to Town Center, the Town Center Hall.

Q What's going on there?

A Uh, I go there for uh, school credit.

Q Oh. What time do you have to be there?

A Uhm, you can go at anytime you want, but you have to put in, they give you a certain limit of hours you have to put in a week, you have to put in 12 hours, so we got to kind of make your schedule to make sure you got those 12 hours.

Q Okay.

[34] A You go in and sign in and sign out when you leave and come and go as you please (unint.)

Q How long had the truck been stopped in front of the dumpster when Paul said this?

A A minute or two.

Q Okay at what point did you see Paul with the gun?

A Uhm, when we had -- when he was sitting down at the very last minute, before he approached the truck. He had just went like that and he had like pulled it out of his pock -- I don't know if he pulled it out of his pocket or his pants and pulled it

like that and showed it and put it back, but then he had put it in his pocket.

Q Okay was he doing that with his right or left hand?

A He was sitting back and I was like in front of him, so he did it with his left hand, I believe.

Q That was just prior to walking up to the truck?

A Yes, so he had already -- he had it out and then his pockets like a -- it was ready now.

Q And you believe that was with his left hand?

A Yes.

Q And you think it was either from his pocket or his waistband or --

A Yes. When he had first brought it out, I don't know if it came from his pocket, his waistband, or his back, but when he put it back away, it was -- he put it in his pocket.

Q So did he have it out just like a second, just enough to flash it?

A He -- he just like, just enough to show.

[35] Q And you think he put the gun in his left pocket?

A Yes. When I was looking at him it was his, to his right, my right, so I was -- he was sitting down like that and he showed like this and I was standing up at him, looking down at him, so it was in his left.

Q Do you know what kind of gun it was?

A Uh, maybe a .38 or a .357.

Q Did you ever look at it later on to determine what kind it was?

A No, I -- when -- when we were taking the gun to hide or 'stash it' somewhere I just, I had it in my pocket.

Q What color was it?

A Uh, it was a black with a brown handle.

Q A revolver or automatic?

A A revolver.

Q Okay. Alright so and Paul makes this jester with the gun, puts it back and then what does Paul do?

A And then uh, he had gotten up and then he started going up ahead of me. He approached the car then I heard it around the side.

Q When Paul did this displaying of the gun uh, did Desmond see the gun?

A I don't know because when he showed the gun, I looked like down at the gun and then I looked away.

Q Do you remember where Desmond was standing?

A I believe he was standing to my right, over on the sidewalk, so --

Q How about --

[36] A -- I -- I did -- I don't know if he saw the gun.

Q -- how about Valerie?

A Valerie was to my right too, sitting down.

Q Do you know if she saw it?

A I have no idea because I had -- when -- when I looked down at the gun I didn't look to see like what else had seen it, I looked down to see what it was.

Q Do you know if Manuel saw it?

A I believe Manuel was still on my left side, a little bit back, leaning against the wall.

Q And then Paul got up and began walking toward the truck?

A Yes.

Q And what side did he approach on?

A On the driver's side.

Q And then what did you do?

A I just -- I approached the passenger's side and really stayed there.

Q What did you think Paul was going to do?

A Uh, at first I didn't -- I wasn't sure if he was going to pull up the gun as soon as he walked up or waited to see if the man gave him a fight or uhm, I was just thinking maybe he would scare him and -- and tell him, you know, just stay away and let -- I'm going to -- we take your car, but apparently he just ended up shooting him.

Q Did you hear what was said between the two of them?

A No.

Q Could hear if words were being said?

[37] A Uhm, not really, not with the diesel truck going in and I'm on my side wondering why I'm on the -- even on that side. I heard the -- the man, he was like, no like no and really trying to get uh, Paul uh, backed off a -- away from him and --

Q Could you hear Paul say anything?

A No. I don't remember him, Paul say anything.

Q So the man was saying something, he said no?

A No, like uhm, he was like -- he was frightened a -- a a couple of times you hear like a -- like a maybe a little scream.

Q And it was your impression that he was -- he was uh, what?

A My, it was my impression that Paul was threatening the man and it -- it took me maybe about 10, 15 seconds to realize that Paul had already had the gun out on him and the man was just scared for his life.

Q Okay and then you're standing where by the passenger side of the pickup truck?

A I was by the door, the -- the passenger door.

Q Were you standing up erect, were you --

A I was --

Q -- on your knees --

A -- some --

Q -- were you --

A -- I was at -- I was like up and down, like standing up straight and ducking a little bit.

Q Did you say anything to man?

[38] A No.

Q Did you say anything to the man?

A No.

Q Did you say anything to Paul?

A No I didn't.

Q Did you encourage Paul to do what he was doing?

A No I did not. I had no idea what was going on on the other side.

Q Let me check the tape here. Okay we've flipped over to side B on the tape and we're continue with this interview. The last thing you said you had no idea what was going on the other side. Could -- how well could you see?

A I'd -- I -- I never saw. They were not clear to the window where I could see through the driver's side or the passenger side window. They were behind, back a little bit and I could not see what was going on.

Q So they were standing back a little toward the rear of the pickup truck?

A No, they were just back where --

Q Just be --

A -- I could not -- I -- 'cause I was looking straight through both windows and they were back just where I couldn't see them.

Q So they would be like just behind the driver's side window?

A Yes.

Q Did you hear Paul demanding any money from the man?

[39] A No, I didn't hear Paul really saying anything. I hear the man uh, a couple of yells and then screaming and then I heard a gunshot and then I heard the man scream more and come towards to, the car.

Q And how many gunshots?

A One.

Q And when you say the man came close to the car, he --

A I meant he came, after he was shot, he came like in almost leaned or fell on the car or the truck.

Q And after he was shot, you said he screamed or hollered or what?

A Yes it was like a -- like a just like a real scream.

Q Could you tell at the time the man was shot, what direction he was facing, what he had been facing --

A He was uhm, like maybe side by side with the truck and Paul was in front of him like that.

Q So where would the man back have been to?

A He -- his back was kind of going towards the dumpster because he was kind of like, it seemed like he was backing, when he was shot, it seemed like he was kind of backing away or just took a couple of steps back, towards the dumpster, but he was never that far from the car though when he was shot and Paul took off running and the man, it seemed like if he had walked towards, closer to the car, maybe to lean on it.

Q And you couldn't tell whether there was struggle or not?

[40] A No, I don't think there's any struggle. I mean I couldn't hear like any noises that I would think there was a struggle or nothing.

Q At the time the shot, could you tell how close Paul was to the man?

A Uhm, maybe a foot or two, two feet away at least.

Q Okay, closer than what we are now?

A Uhm, about right here maybe, maybe a little bit closer.

Q Okay and we're sitting across the table and it's about a --

A Uhm --

Q -- about two and a half feet wide.

A -- two and a half feet.

Q So maybe they were about two feet?

A About two feet from each other.

Q Could you tell if Paul raised his right arm or left arm?

A No, I -- I couldn't see that.

Q So you could not see which arm Paul raised?

A No.

Q At the time that this is all going on, where's Desmond, Valerie, and Manuel?

A I assume they were still by the donut shop, still sitting or standing uhm, between the donut shop and the telephone of Jax. When we were -- when me and Paul were by the car, I -- I never looked back to see what they were doing.

Q Okay and after the shot what happened?

[41] A Uhm, it took me about a -- a good maybe 10, 15 seconds to realize what had happened and by the time I turned to look back at everybody, they were gone and running.

Q So then when you looked toward the, where the others --

A Were they were at --

Q -- they were all running?

A -- they were all gone.

Q And was Paul also running that direction?

A Yes.

Q So they were all running toward the Kentucky Fried Chicken?

A Yes and then they had turned the corner, around the cleaners.

Q And how far were you trailing behind?

A Oh uhm, I was maybe, they had turned the corner and I was still in front of Jax Market.

Q Were you running?

A At first -- at first and no I wasn't really running and then I -- I had seen everybody taking off and then I just started running.

Q Okay. I'm going to turn the tape off for just a moment. I need to take a uh -- uh, facility break. Okay the time's uh, I mean the tape's back on and we'll continue with the interview. Okay so let's see, we left off when they all ran at the corner, by the cleaners about this time, you're in front of Jax Market and then you weren't running at first, is that correct?

[42] A Yes.

Q And then when you saw the others running, you said you started running?

A Yes I did.

Q Okay and then what happened?

A Uhm, we had, when I had turned the corner, I went to turn the corner by the cleaners and started going to the house uh, when I got to the house Manuel was waiting at the gate and opened the gate for me and uh, we went in and by the time I went in, I went to the room and I believe Valerie and Desmond were going out of the room and then that's when they had walked and left and they left walking uh, Paul went to the rest -- Paul was in the rest room, washing up and everything like that uh, I -- I believe -- I, that he took the shirt with him and uh, he had another shirt with -- he had another shirt on and uh, he -- and then he took off walking.

Q So then you and Manuel entered the house at the same time?

A Well Manuel was already there before me, but he entered the -- he was in the backyard before me and then we entered the house at the same time.

Q Then he was holding the gate for you?

A Yes he was holding it.

Q Well then you actually walked into the house together?

A Yes.

Q And you went in through the back?

A Yes.

[43] Q Do you recall whether his mother said anything or father said anything to you at that time or to the group?

A No, they -- they has asked Manny uh, what's going on and uh, Manny said uh, nothing, everybody's just coming back inside and they're going to be leaving right now.

Q Was that Manuel's mom or dad?

A Manuel's mother.

Q And she asked what?

A What -- what was going on?

Q What did Manuel tell her?

A Nothing, that everybody was just uhm, going to be leaving right now.

Q Okay so then when you went into Manuel's bedroom, were Desmond and Valerie there?

A Yes and then when -- and then they had walked out of the room and walked out the front door and left.

Q So was it pretty much you entered the room when they went out?

A Yes, they were -- they were hurrying out.

Q And then is this when you saw that Paul was in the bathroom?

A Yes, I had --

Q Is --

A -- walked by the rest room, I just went into the room and I -- and uh, I had turned around to look through the room and I saw Paul in the rest room.

Q Was the door open?

A Yes it was.

[44] Q And what did you see Paul doing?

A Washing his hands.

Q And did you see something on his hands?

A Blood.

Q How did you feel about that?

A I turned away.

Q Were you upset?

A I was just, yeah well I was upset. Was -- I mean there was no need for him to do that.

Q Did he have blood on both hands or can you tell --

A I think he just had blood on his left hand.

Q Was he still wearing his shirt?

A Yes.

Q Where was the blood on his shirt?

A Uh, it was just like splat -- like almost splattered on his chest.

Q Splattered on the chest?

A Yes.

Q And was Paul still holding the gun at that time?

A No. By the time I got in the house he had already hid it and had went to the rest room.

Q And how do you know he'd already hid it?

A Well he didn't have it on him and then we were wondering, me and Manuel were wondering, where's the gun and he -- that's when we had told him, we has asked somebody had told us (unint.)

Q Who did the gun belong to?

A Paul.

[45] Q It wasn't your gun?

A No, yeah, well he -- I'm -- I'm assuming it belonged to him. He's came to the house with the gun and it was on him at the time.

Q You didn't come to the house with the gun?

A No, I didn't.

Q So if someone said it did, they're wrong?

A Yes they are.

Q So when you asked him where the gun was, he said what?

A Uhm, it was by the bed, underneath the bed, by the dresser.

Q Was under the bed?

A Yes, underneath the bed, by the dresser.

Q And then what happened?

A Uhm, then Paul had gotten -- he had gotten another shirt and he had put that one on, he took, I'm pretty -- I'm thinking that he took his with him because --

Q Where did he get --

A -- he said he was going to get rid of it.

Q -- the other shirt?

A Uhm, somewhere in the room.

Q What kind of shirt was it that (unint.)?

A Just a -- a white one.

Q And he got it somewhere in the room?

A Yes.

Q Okay and then his shirt with the blood on it, what do you think happened to it?

[46] A Uhm, I think he took it with him.

Q Okay, so you didn't see the shirt later on in Manuel's bedroom?

A No. After -- after uh, he took his shirt off, I never saw it again.

Q Okay. And then what happened?

A Uhm, Paul went out the front door, walked through the house, went out the front door and I never saw him again after that.

Q Have you spoken to him since then?

A No.

Q You haven't seen him on the streets?

A No.

Q Okay so that leaves you and Manuel in the bedroom.

A Uh huh.

Q Does Manuel's mother come in the room?

A She had asked what happened and Manuel -- we -- we still said, no, and then uh --

Q This is after -- shortly after Paul left or --

A Yes.

Q So she came -- was the gun still there?

A No, uh, no after -- after Paul had left we waited and me and Manuel were in the room thinking what we're going to do with the gun and uh, and then we took off. We -- and then we 'stashed it' in the park, in the bushes, well by the park, outside of the school.

Q How long did you wait?

A Uhm, maybe at least five minutes.

[47] Q Why didn't you or Paul -- I mean, excuse me, why didn't you or Manuel tell Paul to take his gun with him?

A We just weren't even thinking about telling him just get out of the house. He -- 'cause he don't -- he was going to be walking and he didn't want to be walking with the gun on the street like that and then, so he left it at the house and he's all,

well I'll have -- I'll have uhm, somebody come pick it up in the morning.

Q That was what he said before he left?

A Yes.

Q And did -- did he tell you or you just assumed it?

A No he told us. He told me.

Q He -- did he tell you, I don't want to be walking with a gun on me or --

A No he just said, well I'll leave it here and then (unint.) and them had said no, I guess, (unint.), so he left it and he said, well uh, I'll have somebody come by in the morning to pick it up.

Q And you're sure it wasn't Manuel's gun?

A No, no it wasn't.

Q And then when he said, he'd come tomorrow and have somebody pick up the gun, neither you nor Manuel responded?

A No, we're just like, well okay, but we didn't want to keep the gun in the house, so --

Q So that's when you guys took the gun?

A Yes, we got the gun and went and took it to, by the school.

Q Did the gun have blood on it?

[48] A No.

Q Who picked up the gun?

A I did.

Q Where did you put it?

A In my pocket.

Q You ever handled a gun before?

A Uhm, like uh, sh -- like uh, shooting out in the range and in the desert, like that, but not uh, in the street or anything.

Q When you put it in your pocket and then you and Manuel walked to where?

A To uh, the elementary school next to Santa Fe, I'm not sure the name, I think it's a, like uh, Little Lake.

Q The elementary school near Santa Fe High?

A Right next to Santa Fe.

Q And then where did you put it?

A I hid it in the bushes. I believe close, by the office.

Q Do you know if uh, the gun is still there?

A No they came back and -- and uh, well they had come down the house and then I went over there and uh, I told them it's over there by the -- by, in front of the school, by the bushes.

Q Okay, so then you and Manuel, what'd you do after that?

A Uh, after uh --

Q Hiding the gun?

[49] A -- after hiding the gun we went back to the house and just uh, changed and went to sleep.

Q Were the police uh, around at that time?

A Yes they were.

Q Were they -- did you see them?

A Yes.

Q Did they stop you?

A No they didn't.

Q. When you went back to Manuel's house, did his mother talk to you guys at that time?

A Uh, she had wondered what happened, but Manuel was real, he didn't really want to tell them.

Q So then you guys go to bed?

A Yes.

Q Did you talk about what happened?

A No we just changed and 'knocked out.'

Q Okay then the next day is Saturday.

A Uh huh.

Q These -- when do these people show up at Manuel's house?

A It was maybe like 6, 6, 6:30 in the morning.

Q And who shows up?

A Uhm, the -- there was the other guy from 'Rivera' and --

Q -- Desmond?

A -- Desmond.

Q Desmond?

A Yes.

[50] Q And what was the guy from 'Rivera's' uh, gang name?

A That one was uhm, 'Shy Boy.'

Q 'Shy Boy'?

A Yeah.

Q He was the one that you had seen earlier that day in the park with --

A -- at the park.

Q -- Paul?

A Yes.

Q 'Cause Paul's uh, name is 'Dopey'.

A 'Dopey' and yeah, so the other one, it'd be 'Shy Boy.'

Q And he's also from 'Rivera'?

A Yeah.

Q Okay. What park was it that you had seen 'Shy Boy' and uh, Paul at the day before?

A Uh, Santa Fe Springs Park.

Q And that was earlier on that Friday, right?

A Yes.

Q Okay and then what did -- who spoke, Desmond or 'Shy Boy'?

A Uhm, Desmond I believe.

Q What did he say?

A He had asked where's -- where's the gun at and I told him at the park, hidden in the bushes and I knew he wouldn't be able to find it, so he asked me to walk with him.

Q So then now, when you took him to the gun, who picked the gun up?

[51] A Uhm, 'Shy Boy.'

Q You know I keep hearing your pager beep, do you need to use the phone or --

A No, no.

Q 'Cause if you want to, you can use the phone to make a --

A No, I don't need it.

Q Okay. And we should be done here pretty quick. I'll get you out of here, so you can go about your activities. Okay so 'Shy Boy' picked up the gun?

A Yeah.

Q And where did he put it?

A He put it in his pocket.

Q I don't have a key, so I don't want that door to close on us and lock. Alright and then after he put the gun in his pocket uh --

A I walked back to Manuel's and they went their own way.

Q Okay. Did they say anything to you?

A No.

Q Did they --

A After that, that was it. That was the last --

Q -- did they give --

A -- time I saw --

Q -- give you any, excuse me, I'm sorry to interrupt you, did they give you any uh, did they make any threats or any statements to you about saying anything or --

A No.

[52] Q Did they say where Paul was at that time?

A Nah uh.

Q No? Okay. Do you need a uh, rest room break or water break or anything?

A No.

Q Okay. If you do, just say so and we'll stop. Okay then you went back to Manuel's and did you go back to bed?

A No after that we stayed up and then uh, I changed. I went back to my clothes and we waited, we were at Manuel's house for a while, watching t.v. or what -- whatever and then I went to Jax Market and -- and called for a ride.

Q What time was that?

A Maybe 10, 10:30, between 10:30 and 11.

Q Did you see any activity uhm, going on at that time?

A No.

Q The uh, police weren't still there?

A No.

Q And you went to the phone and who did you get to pick you up?

A Uh, my father picked me up that morning, not that morning, that morning I had -- I had ended up walking home, they were mad because uh, I never got a chance to call the night before.

Q Okay so did you go to the pay phones?

A Yes.

Q And then you were told, no?

A No, that uh, they were mad and they didn't want to pick me up, so I had to walk.

[53] Q Alright. Have you told your parents anything about this?

A No, they don't know anything about it.

Q Have you talked to Manuel since this incident?

A Yes I -- Manuel I see -- well after that I haven't seen Manuel for a while. I see him every once in a while now. Uh, me and him were like best friends at the school.

Q Have you talked to Manuel about what happened since that night?

A No. No, we never talk about it.

Q How about Jason?

A No.

Q Do you guys talk about what happened?

A We'd never talked about what happened. I mean I've seen them 'cause these -- these are people I see at Town Center.

Q How about Valerie? Have you talked to Valerie about what happened?

A Valerie, no I haven't talked to her about what happened, but she said that -- that she had talked to -- I -- I don't know if it was you or uh, the police and that was about it.

Q And Desmond, have you spoke to Desmond?

A I haven't seen Desmond since then.

Q You haven't seen Paul since then?

A No. I haven't seen any of the three males since then --

[54] Q Okay. Okay what I want to go through now is uh, clothing, the best that you can recall that everyone's wearing that evening. Uh, we'll start with what you were wearing.

A I had on tan pants.

Q Were they baggy?

A Yes.

Q When you say tan, is it a light tan?

A Like a beige, like a --

Q Okay, so it would be a light color. Okay and what kind of shirt?

A I had a white, may -- in the beginning of the night, I had a Raiders jersey on and then later in the night I had -- I was wearing a white shirt.

Q Okay earlier you were wearing a Raiders jersey?

A Yes.

Q What did it look like?

A It was just a -- a black -- it was just a black jersey with a gray number.

Q So earlier in the evening you had on a black --

A Yeah.

Q -- is it a jersey?

A Yes.

Q And it's Raiders?

A Yes it was.

Q And what color markings are on it?

A Uh, gray, gray numbering.

Q When did you take that off?

[55] A Uhm, I believe I took it off before we had went back to the phones, before the shooting.

Q So as far as you recall you did not have it on at the time of the shooting?

A No. At the time of the shooting I think I had it over my shoulder, but I really don't remember having it on the time of the shooting.

Q And what was the shirt that you had underneath that?

A It was just a white shirt.

Q A T-shirt or --

A Yes, like a -- a white T-shirt, just what I have on me.

Q Normal size or baggy or --

A No, it was a normal size.

Q And do you recall what kind of shoes?

A Uhm, I had uh, sandals on.

Q What color?

A Black.

Q Did you have a baseball cap?

A No.

Q Okay and what was Manuel wearing?

A Manuel I think had on uh, blue baggy pants and I don't know, I think he, at the time of the shooting I think he had a -- a tank top on like a white undershirt, tank top.

Q Do you remember Manuel wearing a jersey that night?

A I think he had a Emmett Smith jersey, a white one with a blue -- with blue lettering, I think he was wearing that like earlier.

[56] Q But at the time of the shooting he didn't have that on?

A I -- I think and at the time of the shooting I think he just had his tank top. I don't know if he was wearing a jersey.

Q Okay. Do you recall what kind of shoes Manuel had on?

A He just wore plain white, like Nike shoes.

Q Did he have on a hat?

A No.

Q Okay and how about Desmond?

A Uhm, I think he had on brown or gray pants, baggy, brown or gay -- gray, gray baggy pants and uh, like a tan shirt.

Q Uh, a dress shirt or --

A It was --

Q -- pullover --

A -- it was like a button up, but uh, it had no -- no collar. It wasn't a collar shirt, it was a regular T-shirt button up and I think he had black shoes on.

Q Black shoes? Did he have a cap on?

A No.

Q And Paul?

A Uh, gray baggy pants.

Q Dark gray or light gray?

A Uhm, it looked like a dark gray and he had a -- a white sweat shirt and a -- no, he had a white shirt and I believe he had a -- he had a sweat shirt with him.

[57] Q A white shirt, what kind of shirt was it?

A It was just a -- a plain undershirt like a normal size.

Q It have sleeves on it or --

A Yes, it just a short sleeve. It was a short sleeve --

Q When you're saying --

A -- white undershirt, like -- like this one.

Q T-shirt?

A Yes.

Q And that white sweat shirt was -- did he have that with him at the time of the shooting?

A Uhm, no. I don't -- I don't remember the color of the sweat shirt. I think it was either a black or blue, at the time of the shooting he wasn't wearing that because I remember the blood got on his -- on his shirt, so he didn't have the sweat shirt on.

Q And you don't remember at what point he took it off?

A No, when w were at the hou -- when we were still at the house, but I don't remember what -- what time it is and he had on a uh, the black hat, a plain black hat, no lettering, no -- no logo or nothing.

Q When you say hat, you mean baseball cap?

A Yes, a baseball cap.

Q When you guys were walking to the pay phones uh, do you recall at anytime seeing Paul take his T-shirt off and just go bare chested?

[58] A Uhmmm, no because we went -- they were already there at the pay phones when we -- when me and Manuel went, so I don't know if he took off his shirt or not.

Q Okay. When the gun was in Paul's pocket, was it concealed in the pocket or did he need to have his shirt to cover the gun in the pocket?

A No, it -- it looked like it was all concealed in the pocket.

Q Okay. Uhm, and do you recall what kind of shoes Paul had on?

A Uhm, no I don't.

Q I think I forgot to ask earlier on the gun, do you know what length barrel that gun was?

A No I don't. It uh, I'm -- I'm pretty sure it was a .357.

Q Okay.

A It was a --

Q You've seen the -- the --

A -- pretty big one.

Q -- smaller barrel guns like uh, what the ladies carry in their purse or uhm --

A It was maybe about, the barrel was about that long maybe.

Q What was the total length of the gun?

A The total length of the gun was like that. I believe it was -- I'm pretty sure it was .357. That was a pretty big gun.

[59] Q Okay so what you just described could have been either a for or a six inch barrel? Was it -- I'm showing him my 9mm Beretta, was it approximately this length or longer?

A Uhm, I think it was a little bit longer.

Q Okay, slightly longer and the barrel, like my Beretta?

A Yes.

Q Okay. And the only reason I showed you that is I'm just trying to get a --

A Yes.

Q -- feel for the size of the gun.

A Okay.

Q Okay now Valerie, what was Valerie wearing?

A Valerie had on I believe a black sweat shirt and blue pants, regular size pants.

Q Do you recall if she had her hair up or down?

A I believe she had her hair up.

Q You recall her shoes?

A Uhm, they were like uh, tanish, orange boots.

Q And the pants, were they normal length pants?

A Yes.

Q Okay. Uh, on this guy, 'Shy Boy,' is that someone that you'd recognize if you saw him again?

A Uhm, maybe 'cause I was -- when I saw him at the park, I never really saw him that good at that park and then uhm,

in the morning I saw him maybe once or twice because I had to hurry up and get dressed so I could -- so I could show him where it was at.

[60] Q Right.

A So I remember, the one thing I remember the most was he had a shaved head with uh, a little bit of hair, more than mine, and he had a like a little tail I think from the back, from -- not from the very back, like a 'duck tail' in the bottom, from about the middle back, probably like in the middle, a tail maybe about two inches.

Q Okay. About how old is 'Shy Boy'

A Uhm, uh, about maybe 17, 18 (unint.)

Q Hispanic?

A Yes.

Q About how tall?

A Uhm, maybe about 5'4", 5'5", 5'7".

Q And how much do you think he weighs?

A Uhm, 140, 150.

Q And his skin color?

A Uh, it was -- it was like a tanish/brown.

Q So when you say --

A He wasn't too dark.

Q So it'd be a medium or light?

A Uh, maybe a, in between a medium and a light.

Q Any facial hair?

A No.

Q And uh, what was he wearing?

A Uhm, I think he had on black pants, black baggy pants, the morn -- in the morning he had black baggy pants and a, I don't remember what kind of shirt he had on.

Q Were he and Desmond on foot?

[61] A Yes.

Q Okay anything else that I have not asked you, that you think you ought to tell me about now?

A No, that's -- that's the whole night and morning.

Q And Manuel, eh, was definitely not up at the truck?

A Definitely. They were all back, by the donut shop.

Q Okay. And aside from the obvious, why haven't you come forward to the authorities about what happened?

A I have no idea.

Q Afraid?

A More, well not -- afraid partly, but uhm, more like wanted to forget that it happened.

Q Feel bad about what happened?

A Yes.

Q Okay we don't have anything else and what I'm going to do is go ahead uhm, escort you out to the lobby where your parents are and then you guys can go about whatever activities you have and uh, we'll conclude the interview and the time is approximately 1430 hours.

(INTERVIEW TERMINATED)

LODGED
CLERK, U.S. DISTRICT COURT
JUN 12 2000
CENTRAL DISTRICT
OF CALIFORNIA

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HONORABLE PHILIP H. HICKOK, JUDGE PRESIDING
REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT:	DAN E. LUNGREN STATE ATTORNEY GENERAL 300 SPRING STREET NORTH TOWER, SUITE 5001 LOS ANGELES, CALIFORNIA 90013
FOR THE DEFENDANT-APPELLANT:	IN PROPRIA PERSONA

VOLUME 1 OF 3
PAGES 1 THROUGH
242, INCL.

CHRISTIE SCHIZAS, CSR 8790

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT
NO. SO-E HON. PHILIP H. HICKOK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

REPORTER'S TRANSCRIPT ON APPEAL
MARCH 5, 6, 7, 1997

APPEARANCES:

FOR THE PEOPLE: GILBERT GARCETTI,
DISTRICT ATTORNEY
BY: CAROLINE NAKAKI, DEPUTY
12720 NORWALK BOULEVARD
NORWALK, CALIFORNIA 90650

FOR THE DEFENDANT: PAUL R. SOTO
BARRY O. BERNSTEIN
ATTORNEY AT LAW
1901 AVENUE OF THE STARS
SUITE 1240
CENTURY CITY, CALIFORNIA 90067

CHRISTIE SCHIZAS, CSR #8790

[1]

NORWALK, CALIFORNIA;

WEDNESDAY, MARCH 5, 1997

P.M. SESSION

DEPARTMENT SE-E HON. PHILIP H. HICKOK, JUDGE

APPEARANCES:

DEFENDANT, PAUL SOTO, WITH HIS COUNSEL, BARRY BERNSTEIN, PRIVATE COUNSEL; DEFENDANT, MICHAEL ALVARADO, WITH HIS COUNSEL, JOSEPH A. GUTIERREZ, PRIVATE COUNSEL; CAROLINE NAKAKI, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(CHRISTIE SCHIZAS, OFFICIAL REPORTER.)

THE COURT: WE HAVE THE PEOPLE OF THE STATE OF CALIFORNIA VERSUS SOTO AND

ALVARADO. THIS CASE HAS BEEN SENT DOWN HERE FOR TRIAL; IT'S A 9 OF 10 TODAY.

BOTH DEFENDANTS ARE PRESENT IN THE BUILDING; HOWEVER, THEY ARE NOT IN THE COURTROOM.

MS. NAKAKI: CAROLINE NAKAKI FOR THE PEOPLE.

MR. BERNSTEIN: BARRY BERNSTEIN FOR PAUL SOTO.

MR. GUTIERREZ: JOSEPH GUTIERREZ ON BEHALF OF MICHAEL ALVARADO.

THE COURT: LET THE RECORD REFLECT WE HAVE BEEN TALKING BRIEFLY OFF THE RECORD ABOUT LOGISTICS. I'LL READ ALL OF THE MOTIONS AND POINTS AND AUTHORITIES THAT HAVE BEEN SUBMITTED WITH REGARD TO SUPPRESSION OF STATEMENTS, TO SEVERING AND TO PROCEEDING WITH THE USE OF A STATEMENT AGAINST ONE OR

BOTH OF THE DEFENDANTS IN THIS MATTER. AND [2] ALSO THAT WOULD -- ALSO, IT MAY INVOLVE MY LISTENING TO A TAPE, AND IT MAY ALSO INVOLVE MY READING ONE OR MORE TRANSCRIPTS.

DO ME A FAVOR, COUNSEL, AND MAKE SURE EVERYTHING I HAVE HERE AND EVERYTHING THAT HAS BEEN FILED -- BECAUSE I DON'T SEE THE TRANSCRIPT THE PEOPLE HAVE BEEN REFERRING TO HERE --

MR. BERNSTEIN: YOUR HONOR, I REALIZE I FILED THE SALIENT PAGE WHERE HE INVOKES HIS RIGHTS.

THE COURT: DO I NEED ANYTHING IN ADDITION TO THAT?

MR. BERNSTEIN: NOT AS FAR AS I'M CONCERNED.

THE COURT: I'LL REVIEW THAT. IF THERE'S ANYTHING IN ADDITION TO THE WRITTEN INFORMATION I HAVE HERE, PRESENT THAT TO ME

SOME DAY IN THE NEAR FUTURE, BUT NOT THIS AFTERNOON.

WE'LL HAVE A JURY PANEL AVAILABLE TOMORROW MORNING AT 9 O'CLOCK; 60 WILL COME DOWN HERE. THEY WILL BE ON THEIR FOURTH DAY OF JURY SERVICE. IT COULD WELL BE THAT WE'LL HAVE, OUT OF THOSE 60, WE'LL HAVE 40 OR MORE THAT HAVE UNLIMITED DAYS OF JURY SERVICE. THERE'S NO TELLING. IT'S JUST HARD TO SAY WHETHER WE WILL BE ABLE TO RUN OUT OR USE THEM ALL. THAT'S ABOUT THE BEST WE CAN DO.

THE JURY PERSONNEL IS GOING TO SEE WHETHER WE CAN HAVE 60 MORE IN THE AFTERNOON. OTHERWISE, WE WILL GET 60 ON FRIDAY. IF WE DON'T GET A JURY PANEL TOMORROW AFTERNOON, WE CAN DO ALL THE MOTIONS TOMORROW AFTERNOON. IF WE GET A JURY TOMORROW AFTERNOON, I'LL TIME-QUALIFY

THEM THROUGH MARCH THE 21ST, AND THEN FRIDAY IS THE OPPORTUNITY [3] TO RESOLVE ALL ISSUE IN THIS CASE, ALL MOTIONS.

MS. NAKAKI: YOUR HONOR, PERHAPS I MISUNDERSTOOD THE SCHEDULING, BECAUSE SOME OF THE MOTIONS, DEPENDING ON HOW THE COURT RULES, MAY RENDER A DUAL JURY ISSUE MOOT. SO IT WAS MY UNDERSTANDING -- PERHAPS I MISUNDERSTOOD -- THAT WE WERE GOING TO HANDLE THE MOTIONS FIRST BEFORE WE GET TO THE JURY SELECTION.

THE COURT: THE ONLY MOTION THAT MIGHT RENDER THE DUAL JURIES MOOT IS MR. ALVARADO'S MOTION.

MS. NAKAKI: BOTH.

MR. BERNSTEIN: IF YOU KICK BOTH STATEMENTS, WE DON'T NEED DUAL JURIES.

THE COURT: BUT IF I DON'T KICK ONE STATEMENT?

MR. BERNSTEIN: WE ARE BACK TO SQUARE ONE.

MS. NAKAKI: JUST AS MORE OF A TECHNICAL ISSUE, THE MOTION TO SEVER OR IN THE ALTERNATIVE PEOPLE WISH TO AMENDMENT THEIR MOTION IN THE ALTERNATIVE A MOTION FOR ALTERNATE JURIES HASN'T BEEN RULED ON BY THE COURT IN DEPARTMENT J. SO BEFORE WE COMMENCE WITH JURY SELECTION, MY UNDERSTANDING IS THE COURT WOULD HAVE TO RULE AS TO WHETHER OR NOT WE NEED TO SELECT TWO JURIES OR NOT.

SO WOULD WE BE HANDLING THE MOTION FIRST.

THE COURT: DO YOU HAVE THAT IN WRITING?

MS. NAKAKI: YES. THE PEOPLE FILED A MOTION DATED DECEMBER 3, 1996, AS A MOTION TO SEVER.

AT THIS TIME THE PEOPLE ARE AMENDING THAT MOTION ORALLY; MOTION TO SEVER OR IN THE ALTERNATIVE MOTION FOR ALTERNATE JURIES. AUTHORITY WOULD BE UNDER PEOPLE VERSUS HARRIS 47 CAL 3D, 1047.

[4] THE COURT: AS FAR AS YOUR OFFER OF PROOF AS TO THAT, OFF THE RECORD YOU TOLD ME A LITTLE ABOUT HOW THE CASE IS GOING TO PROCEED. WHY DO YOU THINK THAT MULTIPLE, TWO JURIES, WOULD HANDLE THIS CASE AS OPPOSED TO HAVING TWO SEPARATE TRIALS?

MS. NAKAKI: YOUR HONOR, WITH REGARDS TO THAT PARTICUI AR ISSUE, IT'S WITHIN THE COURT'S DISCRETION WHETHER TO HAVE TWO SEPARATE TRIALS OR IN THE ALTERNATIVE HAVE MULTIPLE JURIES.

THE COURT: I'M LOOKING AT UTILIZATION OF TIME AND INCONVENIENCE OF WITNESSES.

MS. NAKAKI: MY UNDERSTANDING IN THIS PARTICULAR CASE THE ONLY REASON WHY THERE WOULD BE A NEED FOR TWO JURY IS THE ARANDA/BRUTON ISSUE. THE EVIDENCE PRESENTED AS TO BOTH DEFENDANTS WILL BE IDENTICAL, THE WITNESSES CALLED TO TESTIFY WILL BE IDENTICAL.

THE ONLY DIFFERENCE IN THE TESTIMONY OR THE EVIDENCE PRESENTED AS TO MR. SOTO AND ALVARADO ARE THEIR RESPECTIVE STATEMENTS, AND MY UNDERSTANDING IN THE CASE OF HARRIS AND SOME OF THE SECONDARY AUTHORITY, PREFERABLE MEANS OF PROVIDING THE ARANDA/BRUTON PROTECTION IS A MULTIPLE JURY, HAVING A SINGLE TRIAL WITH MULTIPLE JURIES.

IT'S NOT ONLY MORE EFFICIENT, BUT YOU HAVE A SITUATION WHERE YOU HAVE THE WITNESSES COMING IN ONE TIME RATHER THAN TWO TIMES, IN TERMS OF SEPARATE TRIALS.

THE COURT: IF I DON'T GRANT BOTH OF YOUR MOTIONS TO SUPPRESS, DO YOU HAVE INPUT AS FAR AS SEPARATE TRIALS VERSUS TWO JURIES?

[5] MR. BERNSTEIN: I THINK IT'S THE COURT'S DISCRETION FROM MY PERSPECTIVE.

MR. GUTIERREZ: I HAD CONSIDERED ASKING FOR SEPARATE TRIALS AS OPPOSED TO DUAL JURIES, BASED ON THE FACT THAT IF PAUL SOTO WENT TO TRIAL FIRST, ONCE HIS CASE WAS RESOLVED, I WOULD CALL HIM AS A WITNESS AND WOULDN'T HAVE TO GO INTO THE ISSUE OF A DECLARATION AGAINST PENAL INTEREST, 1230, HIM BEING UNAVAILABLE.

AS AN OFFICER OF THE COURT, I REPRESENT TO THE COURT -- I SPOKE TO MR. BERNSTEIN, AND HE INFORMED ME THAT, YOU KNOW, UNLESS HE WAS ACQUITTED, IF HE HAD BEEN CONVICTED AND THERE

WAS AN APPEAL, THAT HE WOULD STILL BE UNAVAILABLE.

SO, I WAS GOING TO FILE A MOTION BASED ON THAT, BUT SINCE I CANNOT REPRESENT TO THE COURT THAT MR. SOTO WOULD BE AVAILABLE FOR ME AS A WITNESS ONCE HIS TRIAL IS OVER, THEN I SEE NO PROBLEM WITH DOING DUAL JURIES.

THE COURT: IN THAT CASE, WHAT I'LL DO IS IF I DON'T SUPPRESS BOTH OF THE STATEMENTS, I'M GOING TO GO AHEAD AND IMPANEL TWO JURIES.

LET ME GO AHEAD AND READ THE MATERIALS THAT HAVE BEEN SUBMITTED TO ME, GIVE YOU GUYS THE OPPORTUNITY TO MOVE TABLES, CHAIRS, WHATEVER HAS TO BE DONE, AND WHEN I AM READY, I'LL COME BACK OUT.

(OFF THE RECORD.)

THE COURT: BACK ON THE RECORD. MR. BERNSTEIN, I HAVE THE OPPOSITION THAT WAS FILED BY MS. NAKAKI IN THIS [6] CASE. I DID NOT FIND YOUR MOVING PAPERS.

MR. BERNSTEIN: YOUR HONOR, COULD I HAND THE COURT MY COPY?

THE COURT: IS THE THRUST OF THE STATEMENT THAT YOUR CLIENT SUPPOSEDLY MADE, "I'LL JUST WAIT UNTIL I GO TO COURT, I GUESS, UNTIL I TALK TO MY ATTORNEY, YOU KNOW"?

MR. BERNSTEIN: YES, HE'S BEEN GIVEN HIS MIRANDA RIGHTS AND THE QUOTE IS EXACTLY, "I'LL JUST WAIT TILL -- TILL I GO TO COURT, . GUESS, AND TALK TO MY ATTORNEY, YOU KNOW."

THE COURT: HOLD ON ONE SECOND.

MR. BERNSTEIN: AND THAT PAGE IS AN EXHIBIT TO THE MOTION.

THE COURT: ALL RIGHT. I'VE READ YOUR MOVING PAPERS ALSO, AND A COPY THE OF THE TRANSCRIPT, WHICH IS AT 329. HOW IS THIS UNLIKE THE DAVIS CASE WHERE THERE WAS A, QUOTE, "EQUIVOCAL," REQUEST FOR AN ATTORNEY?

MR. BERNSTEIN: I THINK THIS IS AN UNEQUIVOCAL STATEMENT. "I'LL WAIT," AND THEN THE POLICE, AS YOU SEE, KEEP GOING AND EVENTUALLY A STATEMENT IS RENDERED. AND I THINK IT'S QUITE CLEAR ON THE FACE OF THE LANGUAGE THAT'S USED, AND THAT'S THE CALL THIS COURT HAS TO MAKE, THAT THIS IS AN UNEQUIVOCAL, "I WILL WAIT UNTIL I GET TO COURT AND TALK TO MY ATTORNEY."

THE FACT THAT HE SAYS, "WELL, I GUESS I WILL," THAT'S JUST CONNECTIVE LANGUAGE. THE SALIENT PARTS ARE, "I WILL WAIT," AFTER HE GETS HIS MIRANDA RIGHTS, "UNTIL I GET TO COURT AND

TALK TO MY ATTORNEY." THE POLICE KEEP UP THEIR [7] INTERROGATION AND EVENTUALLY SOMETHING THAT THE DEFENSE WOULD PREFER NOT TO BE BEFORE THE JURY COMES OUT.

THE COURT: MS. NAKAKI?

MS. NAKAKI: YOUR HONOR THE PEOPLE'S INFORMATION WITH REGARDS TO MR. SOTO'S STATEMENT, "I'LL JUST WAIT UNTIL I GO TO COURT, I GUESS, AND TALK TO MY ATTORNEY, YOU KNOW," THE PEOPLE'S POSITION IS THAT IS NOT A CLEAR REQUEST FOR COUNSEL. IT'S AN AMBIGUOUS STATEMENT REGARDING SOMETHING IN THE NATURE OF AN ATTORNEY OR SPEAKING TO AN ATTORNEY POSSIBLY AT SOME TIME IN THE FUTURE.

AND AS THE DAVIS DECISION HELD, OFFICERS DO NOT HAVE AN OBLIGATION TO STOP QUESTIONING A SUSPECT IF HE MAKES AN AMBIGUOUS OR EQUIVOCAL REQUEST FOR COUNSEL,

NOR ARE THEY REQUIRED TO ASK CLARIFYING QUESTIONS WHEN FACED WITH AN AMBIGUOUS OR EQUIVOCAL STATEMENT BY A SUSPECT. THAT'S WHAT WE HAVE IN THIS CASE.

THE PEOPLE'S POSITION IS THAT THE DEFENDANT DID NOT MAKE A CLEAR REQUEST FOR COUNSEL, AND UNDER THE CASE OF DAVIS VERSUS THE UNITED STATES, A 1994 U.S. SUPREME COURT DECISION, THE OFFICERS ARE UNDER NO OBLIGATION TO CEASE QUESTIONING. I THINK HE RAISED IN HIS MOVING PAPERS, PERHAPS, SOMETHING IN THE NATURE OF A 5TH AMENDMENT ASSERTION TO REMAIN SILENT.

THE PEOPLE'S POSITION WAS THAT IT WAS NOT IN ANYWAY AN INDICATION THAT HE WISHED NOT TO SPEAK ANY FURTHER. IT WAS AN AMBIGUOUS OR EQUIVOCAL REQUEST, AT BEST, AND BASED ON THE FACT THAT THERE WAS NOT A CLEAR

REQUEST FOR COUNSEL NOR AN INDICATION, CLEARLY, IN ANY MANNER THAT HE [8] WISHED NOT TO SPEAK ANY FURTHER -- AND WHAT IS SHOWN ON PAGE 329 IS THAT THE DEFENDANT, MR. SOTO, CONTINUED TO ANSWER QUESTIONS. BASED ON THIS AMBIGUITY, THE OFFICERS WERE UNDER NO OBLIGATION TO STOP QUESTIONING MR. SOTO AND THE STATEMENT IS ADMISSIBLE.

THE COURT: ANYTHING ELSE?

MR. BERNSTEIN: I DON'T KNOW WHAT EQUIVOCATION THAT COUNSEL TALKS ABOUT. "I'LL JUST WAIT UNTIL I GO TO COURT AND TALK TO MY ATTORNEY." THERE'S THE CULTURAL CONNECTIVE WORDS OF "I GUESS" AND "YOU KNOW." THAT DOESN'T EQUIVOCATE IN ANY FASHION. THAT'S JUST BEING POLITE AS YOU COMMUNICATE YOUR CLEAR INTENT TO POLICE OFFICERS, WHILE YOU'RE IN A CUSTODIAL SITUATION. AND HE'S BEEN GIVEN

HIS MIRANDA RIGHTS; THERE'S NO QUESTION HE'S IN A CUSTODIAL INTERROGATION. AND I DON'T THINK THERE'S ANY EQUIVOCATION WHATSOEVER IN THIS, AND I THINK IT'S QUITE CLEAR.

THE COURT: WELL, OBVIOUSLY BEING HIS ATTORNEY YOU HAVE ONE VIEW OF IT AND THE PEOPLE HAVE A DIFFERENT VIEW. I AM MORE OF AN IMPARTIAL ARBITER OF THIS. AND TAKING A LOOK AT THE TRANSCRIPT, PUTTING IT IN MORE CONTEXT THAN JUST THE STATEMENT ITSELF, THE STATEMENT MADE BY YOUR CLIENT FOLLOWED A DIALOGUE BY ONE OF THE DEPUTIES, WHICH I ASSUME WAS COMSTOCK, INDICATING, "WE WANT TO KNOW WHAT HAPPENS, BASICALLY, YOU CAN TELL US."

AND YOUR CLIENT SAYS, "I'LL JUST WAIT UNTIL I GO TO COURT, I GUESS, AND TALK TO MY ATTORNEY, YOU KNOW."

AND THEN COMSTOCK SAYS IN RESPONSE TO THAT, "WELL, THAT'S ENTIRELY UP TO YOU."

[9] AND THEN THE OTHER DEPUTY THERE SAYS, "YOU FEEL YOUR ATTORNEY KNOWS THE TRUTH AND YOU DON'T?" THAT WAS A CONTINUATION QUESTION, AND YOUR CLIENT THEN VOLUNTEERS AND SAYS, "NO."

SO I THINK AT BEST IT IS AMBIGUOUS. I DON'T THINK IT WAS A CLEAR, UNEQUIVOCAL REQUEST FOR AN ATTORNEY AND IT COULD HAVE BEEN TAKEN EITHER WAY. AND THE FACT HE THEN CONTINUED TO TALK LENDS CREDENCE TO THE FACT THAT HE DID NOT INVOKE HIS RIGHT TO AN ATTORNEY.

ALL RIGHT, I WILL DENY YOUR MOTION TO SUPPRESS.

MR. BERNSTEIN: THANK YOU, YOUR HONOR.

THE COURT: MR. GUTIERREZ, YOUR MOTION WAS THAT GIVEN THE NATURE OF THE CIRCUMSTANCES, THAT HE WAS AT THE PICO RIVERA SHERIFF'S STATION, WENT DOWN WITH HIS FATHER -- OR MOTHER AND FATHER.

MR. GUTIERREZ: YOUR HONOR, IT'S MY UNDERSTANDING THAT THE POLICE CONTACTED THE MOTHER, THE MOTHER CONTACTED THE FATHER, AND THE FATHER DROVE HIM DOWN TO THE POLICE STATION. THE MOTHER WAS AT THE POLICE STATION ALSO.

THE COURT: BOTH WERE THERE, NEITHER WERE ALLOWED TO GO INTO THE ROOM WITH HIM.

MR. GUTIERREZ: THAT'S CORRECT.

THE COURT: AND HE MADE A STATEMENT TO THE EFFECT, "CAN'T SOMEBODY COME IN WITH ME OR BE HERE WITH ME"?

MR. GUTIERREZ: IT WAS, "SHOULD SOMEBODY BE HERE WITH ME," OR, "IS SOMEONE GOING TO BE HERE WITH ME." MY CLIENT IS NOT CONCRETE AS TO HOW HE SPECIFICALLY SAID IT.

[10] HIS PARENTS ASKED TO GO IN. AS HE WAS BEING ESCORTED INSIDE, THEY APPARENTLY SAID, "NO," SOMETHING TO EFFECT, "WE ARE NOT GOING TO BE LONG." THE PARENTS WERE TOLD TO KEEP OUT. THEY SAT HIM DOWN, THERE WAS SOME PERIPHERAL CONVERSATION BEFORE THEY SET UP THE TAPE; I BELIEVE THE OFFICER WAS GOING THROUGH PAPERWORK, THINGS OF THAT SORT.

MY CLIENT MADE A COMMENT THAT THERE WAS NO RESPONSE TO, "SHOULD SOMEBODY BE HERE FOR ME," BUT HE WAS NEVER MIRANDIZED. MY OFFER OF PROOF IS, ONE, WE HAVE A JUVENILE. HE'S NOT AN ADULT, HE'S A JUVENILE. HE'S NEVER BEEN ARRESTED BEFORE. I BELIEVE HE ONCE WAS

CITED FOR A CURFEW VIOLATION, BUT NEVER BEEN INVOLVED IN THE JUVENILE SYSTEM OR THE ADULT SYSTEM. HE'S NEVER BEEN PROSECUTED FOR A SERIOUS CRIME OF ANY KIND.

IN FACT, HE'S NEVER EVEN BEEN ARRESTED FOR A CRIME, OTHER THAN, I THINK, NOT GOING HOME AT A CERTAIN TIME, BEING OUT ON THE STREETS BEYOND THE HOURS OF CURFEW. AND HE DID HAVE THAT ONE CONTACT WITH LAW ENFORCEMENT.

THE COURT: IT'S YOUR POSITION THAT PUTTING HIM INTO A ROOM WAS A SUBSTANTIAL OR SIGNIFICANT DEPRAVATION OF HIS FREEDOM OR CONVEYED THE IMPRESSION THAT HE WAS FREE TO LEAVE.

MR. GUTIERREZ: AS I CITE IN MY MOVING PAPERS, PARTICULARLY PAGE 4, AND I CITE THE WATERSHED CASE, THE LANDMARK CASE OF

EDWARDS VS. ARIZONA. IT STATES NOT ONLY THAT A PERSON IS TAKEN INTO CUSTODY OR OTHERWISE DEPRIVED OF HIS FREEDOM OF ACTION IN any SIGNIFICANT WAY.

[11] IN THIS CASE, WE HAVE A JUVENILE TAKEN TO THE POLICE STATION, INTERVIEWED FOR TWO-PLUS HOURS, WE KNOW HE'S NOT A VERY SOPHISTICATED PERSON, HE HAS NO RECORD OR ANYTHING OF THAT SORT.

IT'S MY UNDERSTANDING THAT HE WAS A SUSPECT AT THAT TIME, THAT HE WAS NOT FREE TO LEAVE, THAT IT WAS IN THE INTERROGATION ROOM OF THE POLICE STATION. AND IF YOU LOOK AT THE CIRCUMSTANCES, AND I CITE PEOPLE VERSUS BOYER, THE MOST IMPORTANT CONVERSATION IN DECIDING IS THE CUSTODY ISSUE INCLUDE: ONE, THE SITE OF THE INTERROGATION. TWO, WHETHER THE INTERROGATION FOCUSED ON THE SUSPECT.

AND, THREE, WHETHER THE OBJECTIVE INDICIA OF ARREST ARE PRESENT AND THE LENGTH AND FORM OF QUESTIONING.

HERE THE SITE OF THE INTERROGATION IS A POLICE STATION, APPROPRIATE LOCATION FOR INTERROGATION. TWO, THE INTERROGATION HAD FOCUSED ON MY CLIENT BECAUSE IT'S MY UNDERSTANDING THAT HE WAS A SUSPECT AND THAT, IN FACT, WAS ARTICULATED TO THE MOTHER WHEN SHE TURNED HIM IN WEEKS LATER WHEN THE DISTRICT ATTORNEY DECIDED TO CHARGE IT.

AND, IN FACT, MY CLIENT INFORMS ME THAT WHEN HE WAS BEING ESCORTED INTO THE INTERROGATION ROOM, APPARENTLY THERE WAS A BRIEF CONVERSATION WHERE ONE OFFICER ASKED -- I DON'T KNOW IF IT WAS DETECTIVE LEE OR COMSTOCK -- "WHAT DO WE HAVE HERE; WE ARE GOING TO QUESTION A SUSPECT," SOMETHING TO

THAT EFFECT. I THINK THE INVESTIGATION WAS SUCH THAT MY CLIENT WAS A SUSPECT AN AIDING BETTING THEORY.

THREE, WHETHER THE OBJECTIVE INDICIA OF ARREST WAS PRESENT. THAT GOES BACK TO THE LOCATION OF THE [12] INTERVIEW; IN A POLICE INTERROGATION ROOM. PARENTS NOT PERMITTED TO GO IN THERE, HE DID NOT BELIEVE HE WAS FREE TO LEAVE.

IT WAS A LENGTHY INTERROGATION OF TWO-PLUS HOURS AS THE CASE SUGGESTION. SO I THINK WHAT WE DO HAVE IS A CUSTODIAL INTERROGATION. AND THEREFORE, MY CLIENT SHOULD HAVE BEEN GIVEN THE BENEFITS OF MIRANDA. THE FACT THAT THEY DID NOT ARREST HIM AND ALLOWED HIM TO GO HOME, IF ANYTHING, SHOWS SOPHISTICATION OF THE GOVERNMENT IN THAT THEY KNOW THAT ANY TIME YOU DO HAVE A

CUSTODIAL INTERROGATION YOU HAVE TO GIVE MIRANDA. THEY DID NOT IN THIS CASE AND SUBSEQUENTLY ARRESTED AND CHARGED HIM AND HE WAS A SUSPECT.

THE OBJECTIVE CRITERIA AND THE SUBJECTIVE CRITERIA, THE FACT OF MY CLIENT'S BELIEVING HE WAS IN CUSTODY, HE SHOULD HAVE RECEIVED THE BENEFITS OF MIRANDA.

AND I'LL SUBMIT IT.

THE COURT: WHY DOES NOT THIS FALL WITHIN THE PAREMETERS OF THE MATHIASON CASE THAT WAS A SITUATION WHERE THE INDIVIDUAL IS TAKEN DOWN TO THE POLICE STATION, INTERVIEWED FOR AT LEAST 30 MINUTES OR LONGER AND THEN WAS, IN FACT, LET GO.

MR. GUTIERREZ: I THINK WHAT'S DIFFERENT IS THE LENGTHS OF THE INTERVIEW, THE FACT THAT MY CLIENT WAS DEFINITELY A SUSPECT. AND I

THINK THE LENGTH OF THE INTERVIEW IS ONE OF THE PRIMARY FACTORS, AND ALSO, AS I INDICATED TO THE COURT, I AM MAKING AN ISSUE INVOLUNTARINESS OF THE STATEMENT.

THE COURT: MS. NAKAKI.

[13] MS. NAKAKI: YOUR HONOR, THE PEOPLE'S POSITION IS THAT THE CASE OF OREGON VERSUS MATHIASON 429, U.S. 711, A 1977 U.S. SUPREME COURT DECISION, IS DIRECTLY ON POINT TO THE SITUATION THAT WE HAVE HERE WITH MR. ALVARADO'S INTERVIEW BY DETECTIVE COMSTOCK. THERE ARE A NUMBER OF SIMILARITIES: ONE, THE LOCATION OF THE INTERVIEW. IN THE MATHIASON CASE THAT SUSPECT WAS, IN FACT, INTERVIEWED AT THE POLICE STATION.

AND WHAT THE SUPREME COURT NOTED IS SIMPLY BECAUSE THERE IS AN INTERVIEW AT A POLICE STATION DOES NOT RENDER A CUSTODIAL-

TYPE SITUATION. THAT'S WHAT WAS ESSENTIALLY THE SITUATION IN THE CASE OF MR. ALVARADO'S INTERVIEW. MY UNDERSTANDING IS THAT MR. ALVARADO WAS REQUESTED, THROUGH A REQUEST BY DETECTIVE COMSTOCK OF MR. ALVARADO'S PARENTS, TO HAVE HIM AVAILABLE FOR QUESTIONING, WHICH THEY DID BRING HIM TO THE STATION.

AND FOLLOWING THE INTERVIEW BY DETECTIVE COMSTOCK, MR. ALVARADO'S WAS PERMITTED TO LEAVE THE STATION. AND THAT'S WHAT IS TELLING ABOUT WHETHER OR NOT THERE WAS, IN FACT, A CUSTODIAL-TYPE SITUATION, THAT FOLLOWING THE INTERVIEW, MR. ALVARADO'S WAS FREE TO LEAVE. AND, IN FACT, DID LEAVE WITH HIS PARENTS FOLLOWING THE INTERVIEW.

AND ANOTHER SIMILARITY WITH THE MATHIASON CASE IS WHEN THE SUSPECT IN

MATHIASON WAS BROUGHT TO THE STATION TO BE INTERVIEWED, THE OFFICER DID, IN FACT, TELL HIM THAT HE WAS BEING INTERVIEWED FOR PURPOSES OF A BURGLARY INVESTIGATION, AND THAT THEY DID CONSIDER HIM A SUSPECT IN THE CASE.

[14] SO THE FACT THAT THE DETECTIVE IN THIS CASE THOUGHT PERHAPS THAT MR. ALVARADO'S WAS A SUSPECT IS NOT DISPOSITIVE, AND, AGAIN, THE PEOPLE'S POSITION IS THAT THE CASE OF OREGON VERSUS MATHIASON IS DIRECTLY ON POINT TO THE SITUATION WITH MR. ALVARADO.

MR. GUTIERREZ: I WOULD SUBMIT ONE THING TO THE COURT. I THINK IF MY CLIENT WAS A SUSPECT, AND THE OFFICERS BELIEVED HIM TO BE A SUSPECT AT THE TIME, THAT THEY SHOULD NOT BE ALLOWED TO CIRCUMVENT MIRANDA BY ALLOWING HIM TO GO HOME, KNOWING THEY CAN ARREST HIM A WEEK OR TWO LATER.

IN SOME WAYS IT'S ANALOGOUS TO THE SITUATION WE HAVE THAT RIGHT NOW, WHICH IS QUITE A CONTROVERSY IN THE LEGAL PROFESSION, WHEN POLICE OFFICERS WILL SAY, "OKAY, YOU DON'T WANT TO WAIVE YOUR MIRANDA RIGHTS, TELL ME OFF THE RECORD WHAT HAPPENED." AND THEN LATER ON WHEN THE DEFENDANT TAKES THE STAND, THEY IMPEACH HIM UNDER NEW YORK VS. HARRIS, AND ALTHOUGH THAT'S APPROPRIATE RIGHT NOW UNDER NEW YORK VS. HARRIS, I THINK THERE'S A GROWING CONCERN IN THE LEGAL PROFESSION, AND RIGHTFULLY SO, THAT THE POLICE SHOULD NOT BE ALLOWED TO BASICALLY CIRCUMVENT GOOD LAW, GOOD PRINCIPLES, AND THAT'S WHAT WE ARE DOING HERE.

I THINK THAT THIS YOUNG MAN, IF HE'S A SUSPECT IN A VERY SERIOUS CHARGE, SUCH AS MURDER, IS TAKEN TO THE POLICE STATION AND

HAS TO SUBMIT TO A QUESTIONING, THEY WANT HIM THERE, THEY DIDN'T INVITE HIM, HE WAS TOLD THAT HE HAD TO COME THERE. HE GOES THERE, THEY QUESTION HIM FOR TWO HOURS, THEY SHOULD GIVE HIM THE BENEFIT OF MIRANDA. MIRANDA IS GOOD LAW, AND I DON'T THINK IT SHOULD BE CIRCUMVENTED.

[15] THE COURT: I THINK YOU'RE RIGHT THAT MIRANDA IS GOOD LAW. I'M NOT SURE THAT IT APPLIES IN THIS CASE. IN MATHIASON IT LOOKS LIKES THE INVESTIGATION HAD REALLY NARROWED DOWN TO MATHIASON HIMSELF, AND HE WAS BASICALLY TOLD, "IT'S UP TO THE D.A. THE D.A. IS GOING TO MAKE A DECISION WHETHER TO FILE ON YOUR GUY OR NOT, BUT WE ARE GOING TO LET YOU GO UNTIL THAT TIME."

THAT REALLY NARROWS ITSELF DOWN. IN THAT SITUATION, IT WASN'T A CUSTODIAL.

MR. GUTIERREZ: REGARDING THE SUBSEQUENT ISSUE REGARDING THE EDWARDS VS. ARIZONA, REGARDING THE RIGHT TO COUNSEL, I'LL JUST SUBMIT IT, YOUR HONOR, ON MY MOVING PAPERS.

THE COURT: THAT REQUEST, THEN, FOR SUPPRESSION IS DENIED.

WHY DON'T WE GO AHEAD AND RECESS UNTIL TOMORROW MORNING. LET THE RECORD REFLECT WE'VE KIND OF REARRANGED THE COURTROOM HERE TO MAKE IT AS EASY AS POSSIBLE FOR EVERYBODY AND WE CAN GET 60 JURORS DOWN HERE TOMORROW. DO WE CARE WHO GOES FIRST?

MR. GUTIERREZ: MR. BERNSTEIN AND I SPOKE. APPARENTLY BECAUSE HE'S FIRST IN THE COMPLAINT, HE'LL GO FIRST.

THE COURT: WHY DON'T WE GET IN HERE AS CLOSE TO 9 O'CLOCK AS POSSIBLE. WE HAVE A

COUPLE OF HOUSEKEEPING MATTERS TO TAKE CARE OF BEFORE WE BRING A JURY PANEL DOWN.

MR. GUTIERREZ: I WILL BE HERE EARLY AND KEEP CHECKING IN WITH THE COURT.

[16] MR. BERNSTEIN: ONE OF THE THINGS WE DISCUSSED OFF THE RECORD WAS SECURITY. I HAD A CHANCE TO TALK TO YOUR BAILIFF. AS FAR AS MY CLIENT'S CONCERNED, WHAT WAS THAT THING YOU TOLD ME YOU WERE GOING TO DO?

THE BAILIFF: REACT BELT. IT GOES UNDER THE CIVILIAN CLOTHING HE'LL HAVE ON.

MR. BERNSTEIN: MY UNDERSTANDING OF IT IS THAT BECAUSE IT'S UNDER THE CIVILIAN CLOTHES, IT'S NOT APPARENT TO THE JURY. AND SO ACCORDINGLY, I HAVE NO OBJECTION. IF FOR SOME REASON IT BECOMES -- CIRCUMSTANCES CHANGE AND THE JURY CAN SEE IT, I'LL BRING IT TO THE COURTS ATTENTION.

MR. GUTIERREZ: ONE LAST POINT, I DON'T THINK I MADE MY POINT CLEAR ON THE RECORD. THERE WAS CONVERSATION OFF THE RECORD EARLIER. MY PREFERENCE IS TO HAVE A SINGLE, AS OPPOSED TO A DUAL JURY. I UNDERSTAND MR. BERNSTEIN'S CONCERN. AND IN LIGHT OF THE COURT'S RULING REGARDING MY CLIENT'S STATEMENT, IF THE PEOPLE DO INTEND TO INTRODUCE IT IN THEIR CASE IN CHIEF, I RECOGNIZE CO-COUNSEL'S CONCERN FOR A JOINT TRIAL. MY PREFERENCE IS A JOINT TRIAL.

THE COURT: THE INHERENT DISCRETION OF THE COURT IS OTHERWISE. WE WILL HAVE TWO JURIES. 9 O'CLOCK TOMORROW.

(WHEREUPON THE PROCEEDINGS WERE ADJOURNED TO THURSDAY, MARCH 6, 1997, AT 9:00 A.M.)

LODGED
CLERK, U.S. DISTRICT COURT
JUN 12 2000
CENTRAL DISTRICT
OF CALIFORNIA

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HONORABLE PHILIP H. HICKOK, JUDGE PRESIDING
REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT:	DAN E. LUNGREN STATE ATTORNEY GENERAL 300 SPRING STREET NORTH TOWER, SUITE 5001 LOS ANGELES, CALIFORNIA 90013
FOR THE DEFENDANT-APPELLANT:	IN PROPRIA PERSONA

VOLUME 2 OF 3
PAGES 243 THROUGH
513, INCL.

CHRISTIE SCHIZAS, CSR 8790

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT
NO. SO-E HON. PHILIP H. HICKOK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

REPORTER'S TRANSCRIPT ON APPEAL
MARCH 10, 11, 1997

APPEARANCES:

FOR THE PEOPLE: GILBERT GARCETTI
DISTRICT ATTORNEY
BY: CAROLINE NAKAKI, DEPUTY
12720 NORWALK BOULEVARD
NORWALK, CALIFORNIA 90650

FOR THE DEFENDANT: PAUL R. SOTO
BARRY O. BERNSTEIN
ATTORNEY AT LAW
1901 AVENUE OF THE STARS
SUITE 1240
CENTURY CITY, CALIFORNIA 90067

CHRISTIE SCHIZAS, CSR #8790

[265] MS. NAKAKI: YOUR HONOR, THE PEOPLE CALL MANUEL RIVERA.

THE CLERK: DO YOU SOLEMNLY SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NŌTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

MANUEL RIVERA,

PRODUCED AS A WITNESS BY AND ON BEHALF OF THE PEOPLE, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE TAKE A SEAT IN THE WITNESS STAND. STATE YOUR NAME AND SPELL YOUR FIRST LAST NAME FOR THE RECORD.

THE WITNESS: MANUEL RIVERA; M-A-N-U-E-L R-I-V-E-R-A.

THE COURT: GO AHEAD.

+DIRECT EXAMINATION

BY MS. NAKAKI:

Q GOOD MORNING, MR. RIVERA.

A GOOD MORNING.

Q ON SEPTEMBER 22, 1995, WERE YOU LIVING AT 11551-1/2 DAVENRICH AVENUE, D-A-V-E-N-R-I-C-H, AVENUE?

A YES.

Q AND THAT'S IN THE CITY OF SANTA FE SPRINGS, COUNTY OF LOS ANGELES?

A YES, IT IS.

[266] Q AND THE RESIDENCE THAT YOU WERE LIVING IN WAS NEXT TO A SHOPPING CENTER; IS THAT CORRECT?

A YES.

Q ON THAT DAY ON SEPTEMBER 22, 1995, DURING THE DAY, WHERE WERE YOU?

A DURING THE DAY I WAS AT TOWN CENTER HALL.

Q WHAT IS TOWN CENTER HALL?

A IT'S LIKE AN ACTIVITY CENTER FOR YOUTH.

Q WAS THERE ANYONE, ANY OF YOUR FRIENDS WITH YOU WHEN YOU WERE AT THE TOWN CENTER HALL?

A YES.

Q WHO WAS WITH YOU?

A MYSELF, MIKE AND JASON.

Q YOU MENTIONED THE NAME MIKE. IS MIKE IN THE COURTROOM TODAY?

A YES, HE IS.

Q WOULD YOU POINT HIM OUT AND TELL US WHAT HE'S WEARING IN COURT TODAY?

A SEATED OVER THERE WEARING A WHITE SHIRT AND A TIE.

THE COURT: INDICATING FOR THE RECORD THE DEFENDANT, MR. ALVARADO.

Q BY MS. NAKAKI: NOW, AT SOME POINT DID YOU LEAVE THE TOWN CENTER HALL?

A YES, WE DID.

Q WHERE DID YOU GO?

A WE WENT BACK TO MY HOUSE.

Q YOU SAID WE WENT BACK TO YOUR HOUSE. WHO WENT [267] BACK TO YOUR HOUSE?

A MYSELF AND MIKE.

Q AND MIKE BEING THE PERSON YOU IDENTIFIED IN COURT TODAY?

A YES.

Q DO YOU REMEMBER ABOUT WHAT TIME THAT WAS THAT YOU AND MIKE WENT BACK TO YOUR HOUSE?

A NO.

Q WAS IT IN THE AFTERNOON SOMETIME?

A YES.

Q WHILE YOU WERE AT YOUR HOUSE DID ANYONE ELSE COME TO YOUR HOUSE?

A YES.

Q DO YOU REMEMBER WHO ELSE CAME TO YOUR PLACE ON SEPTEMBER 22, 1995?

A THE EVENING, YES.

Q WHO IN THE EVENING OF SEPTEMBER 22, 1995 CAME TO YOUR HOUSE?

A JASON, VALERIE, DESMOND, MR. SOTO.

Q NOW, YOU MENTIONED A PERSON BY THE NAME OF JASON. DO YOU KNOW JASON'S LAST NAME?

A ROMERO.

Q AND YOU MENTIONED VALERIE. DO YOU KNOW VALERIE'S LAST NAME?

A NO, I DON'T.

Q AND YOU MENTIONED AN INDIVIDUAL BY THE NAME OF DESMOND. DO YOU KNOW HIS LAST NAME?

A PACHECO.

[268] Q AND YOU MENTIONED SOMEONE BY THE NAME OF -- YOU IDENTIFIED AS A MR. SOTO CAME TO YOUR HOUSE THAT EVENING. DO YOU KNOW MR. SOTO'S FIRST NAME?

A PAUL.

Q WITH REGARDS TO PAUL SOTO, IS PAUL SOTO IN THE COURTROOM TODAY?

A YES, HE IS.

Q WOULD YOU POINT OUT PAUL SOTO AND TELL US WHAT HE'S WEARING IN COURT TODAY?

A RIGHT THERE, WEARING A GREEN SHIRT.

THE COURT: INDICATING FOR THE RECORD THE DEFENDANT, MR. SOTO.

Q BY MS. NAKAKI: WAS MIKE AT THE HOUSE ALSO THAT EVENING?

A YES, HE WAS.

Q WAS THERE ANYBODY ELSE THAT CAME TO YOUR HOUSE THAT EVENING?

A YES.

Q AND WHO ELSE CAME TO YOUR HOUSE THAT EVENING?

A TONI.

Q IS TONI A MAN OR A WOMAN?

A IS A FEMALE. TONI AND SONJA.

Q DO YOU KNOW EITHER TONI OR SONJA'S LAST NAME?

A SONJA RIOS AND TONI BAZURTO.

Q WERE THERE ANY OTHER PEOPLE THAT CAME BY YOUR HOUSE THAT EVENING?

A NO.

Q SO AT ONE POINT YOU, MIKE, TONI BAZURTO, SONJA [269] RIOS, JASON ROMERO, VALERIE, DESMOND PACHECO AND PAUL SOTO AND MICHAEL ALVARADO WERE AT YOUR HOUSE; IT THAT RIGHT?

A YES.

Q AND WHILE YOU WERE AT THE HOUSE HAD YOU BEEN DRINKING?

A YES.

Q DO YOU REMEMBER IF PAUL SOTO WAS DRINKING?

A YES.

Q WAS MICHAEL ALVARADO DRINKING?

A YES.

Q AND THE OTHER PEOPLE THAT YOU MENTIONED AT THE HOUSE, WERE THEY ALL DRINKING, IF YOU KNOW?

A YES, WE ALL WERE DRINKING.

Q DO YOU REMEMBER WHAT YOU WERE DRINKING?

A YES.

Q WHAT?

A BUDWEISER.

Q AND DO YOU REMEMBER HOW MUCH BUDWEISER YOU HAD THAT EVENING?

A ABOUT TWO 40-OUNCERS.

Q THAT WAS THROUGHOUT THE EVENING?

A NO. THERE WAS MORE.

Q YOU HAD OTHER THINGS TO DRINK?

A YES.

Q WHAT ELSE DID YOU DRINK?

A STRAWBERRY WINE, SOME MORE BEER.

Q ABOUT WHAT TIME DO YOU REMEMBER THAT YOU STARTED DRINKING?

[270] A I DON'T REMEMBER THE TIME.

Q HOW LONG OF A PERIOD OF TIME WAS IT? A HALF HOUR, SEVERAL HOURS?

A SEVERAL HOURS.

Q AND WITH RESPECT TO PAUL SOTO, YOU STATED HE HAD BEEN DRINKING ALSO, CORRECT?

A YES.

Q DO YOU REMEMBER WHAT HE WAS DRINKING?

A THE SAME 40-OUNCERS.

Q DO YOU KNOW HOW MANY 40-OUNCERS HE HAD?

A NO, I DON'T.

Q HOW ABOUT MICHAEL ALVARADO; DO YOU REMEMBER IF HE HAD BEEN DRINKING?

A YES.

Q DO YOU RECALL HOW MUCH MICHAEL HAD BEEN DRINKING?

A NO, I DO NOT.

Q WAS PAUL SOTO DRINKING THROUGHOUT THIS SEVERAL HOUR TIME FRAME ALSO?

A YES.

Q AND HOW ABOUT MICHAEL ALVARADO; WAS HE DRINKING THROUGHOUT THIS SEVERAL-HOUR TIME FRAME?

A YES.

Q AT SOME POINT -- LET ME BACK UP.

AT THE TIME ON SEPTEMBER 22, 1995, DID YOU HAVE A TELEPHONE IN YOUR HOME?

A NO.

Q IN ORDER TO USE A PHONE WHERE WOULD YOU HAVE [271] TO GO?

A TO THE SHOPPING CENTER.

Q IS THAT RIGHT NEXT TO YOUR HOUSE; IS THAT CORRECT?

A YES, IT IS.

Q ARE THERE PAY PHONES THERE?

A YES.

Q NOW, DURING THAT EVENING DID ANY OF THE PEOPLE AT THE PARTY USE THE PAY PHONES?

A YES.

Q AND DO YOU REMEMBER WHO?

A JASON WENT FIRST, AND THEN LATER IN THE EVENING AFTER EVERYONE WAS LEAVING EVERYONE ELSE WENT TO THE PAY PHONE.

Q SO THROUGHOUT THE EVENING VARIOUS PEOPLE WOULD GO TO USE THE PAY PHONES?

A YES.

Q IS IT BY A PARTICULAR STORE OR RESTAURANT?

A IT'S BY JACK'S MARKET.

MS. NAKAKI: YOUR HONOR, I HAVE A SERIES OF FOUR PHOTOGRAPHS MARKED A, B, C AND D. I WOULD LIKE TO COLLECTIVELY MARK THEM PEOPLE'S 1 FOR IDENTIFICATION.

THE COURT: ALL RIGHT. PEOPLE'S NUMBER 1, THEN. A SERIES OF PHOTOGRAPHS ON ONE POSTER BOARD.

(WHEREUPON, SERIES OF PHOTOS, PEOPLE'S EXHIBIT 1, WAS MARKED FOR IDENTIFICATION.)

[272] MS. NAKAKI: YOUR HONOR, I'M GOING TO PLACE THIS UP ON THE BOARD HERE. MAY I HAVE THE WITNESS STEP DOWN.?

THE COURT: YES, YOU MAY.

Q BY MS. NAKAKI: WE'RE LOOKING AT PEOPLE'S 1-A, IT'S THE UPPER LEFT-HAND PHOTOGRAPH.

DO YOU REMEMBER RECOGNIZE WHAT IS IN THAT PHOTOGRAPH, WHAT THE PHOTOGRAPH DEPICTS?

A YES.

Q WHAT IS IT?

A THE SHOPPING CENTER PARKING LOT.

Q YOU ARE GOING TO HAVE TO KEEP YOUR VOICE UP.

A THE SHOPPING CENTER PARKING LOT.

Q IS THIS THE SHOPPING CENTER THAT WAS NEXT TO YOUR HOUSE ON SEPTEMBER 22, 1995?

A YES, IT IS.

Q AND YOU HAD STATED THAT THE PHONES THAT PEOPLE WERE USING WERE BY A JACK'S MARKET; IS THAT CORRECT?

A YES.

Q AND IF JACK'S MARKET IS ON THAT PHOTOGRAPH IN PEOPLE'S 1-A, CAN YOU POINT TO WHERE JACK'S MARKET IS?

A THERE.

MS. NAKAKI: THE WITNESS POINTED TO THE UPPER POTION OF THE PHOTOGRAPH. AND I'M HANDING THE WITNESS AN ORANGE MARKER.

Q WOULD YOU GO AHEAD AND CIRCLE THE PORTION THAT IS JACK'S MARKET.

A (COMPLIES).

MS. NAKAKI: THE WITNESS PLACED A CIRCLE IN ORANGE ON [273] PEOPLE'S 1-A.

Q LOOKING AT PEOPLE'S 1-B, DO YOU RECOGNIZE WHAT IS DEPICTED IN THIS PHOTOGRAPH?

A YES.

Q WHAT IS DEPICTED IN THAT PHOTOGRAPH?

A AERIAL PHOTO OF THE SHOPPING CENTER.

Q YOU STATED THAT YOUR HOUSE IS NEXT TO THE SHOPPING CENTER; IS THAT RIGHT?

A YES, IT IS.

Q THE HOUSE THAT YOU WERE LIVING IN ON SEPTEMBER 22, 1995?

A YES.

Q IS YOUR HOUSE DEPICTED IN THIS PHOTOGRAPH, PEOPLE'S 1-B?

A YES, IT IS.

Q GO AHEAD AND CIRCLE THE HOUSE THAT YOU WERE LIVING IN ON SEPTEMBER 22, 1995.

A (COMPLIES).

MS. NAKAKI: THE WITNESS PLACED A CIRCLE ON PEOPLE'S 1-B.

Q YOU CAN GO AHEAD AND HAVE A SEAT.

NOW, AT SOME POINT YOU SAID TOWARDS THE END OF THE EVENING EVERYBODY WENT TO GO USE THE PHONES, IS THAT RIGHT?

A THAT IS CORRECT.

Q AND DO YOU REMEMBER WHO WENT TO GO USE THE PHONES LATER THAT EVENING?

A YES.

[274] Q WHO?

A MYSELF, MIKE, PAUL, JASON, DESMOND AND VALERIE.

Q SO 6 PEOPLE ALTOGETHER?

A YES.

Q WHAT HAPPENED TO THE OTHER FOLKS THAT YOU HAD MENTIONED WERE AT YOUR HOUSE THAT EVENING, TONI BAZURTO, SONJA RIOS, WHAT HAPPENED TO THEM?

A THEY WERE TAKEN HOME.

Q NOW, AT THE TIME WHEN THE GROUP THAT YOU MENTION, THE SIX OF YOU HAD GONE TO USE THE PHONES, DO YOU REMEMBER APPROXIMATELY WHAT TIME THAT WAS?

A NO, I DON'T.

Q WAS IT AFTER MIDNIGHT?

A YES.

Q NOW, WHEN THE GROUP OF YOU HAD GONE TO USE THE PHONES, WHERE WERE YOU? WERE YOU ALL STANDING? WERE YOU IN THE PARKING LOT OF ONE OF THE BUSINESSES? DO YOU REMEMBER?

A YES, WE WERE STANDING NEAR JACK'S MARKET.

Q AND YOU CIRCLED AN AREA IN PEOPLE'S 1-A. WERE YOU IN THAT GENERAL AREA?

A YES,

Q WAS THE ENTIRE GROUP IN THAT GENERAL AREA?

A YES.

Q WHEN YOU ALL WERE THERE IN THAT GENERAL AREA, DID YOU SEE TRUCK PULL INTO THE PARKING LOT?

A YES.

Q AND DO YOU REMEMBER IF IT WAS A NEW TRUCK OR [275] OLDER TRUCK?

A AN OLDER TRUCK.

Q NOW, WHEN THIS TRUCK PULLED INTO THE PARKING LOT, DO YOU REMEMBER IF ANYONE WENT UP TO THE TRUCK WHEN IT CAME INTO THE PARKING LOT?

A YES.

Q AND WHO WAS IT THAT WENT UP TO THE TRUCK?

A VALERIE.

Q AND VALERIE WAS ONE OF THE PEOPLE AT THE PARTY AT YOUR HOUSE?

A YES.

Q AND DID THE TRUCK STOP?

A YES, IT DID.

Q AND WAS THIS IN THE PARKING LOT?

A YES, IT WAS.

Q MR. RIVERA, WOULD YOU STEP DOWN AGAIN. AND IF IT'S EITHER IN PEOPLE'S 1-A OR 1-B,

CAN YOU SHOW US WHERE THE TRUCK FIRST STOPPED WHEN VALERIE APPROACHED THE TRUCK?

A HERE (INDICATING).

MS. NAKAKI: THE WITNESS HAS POINTED TO THE LEFT-HAND PORTION OF THE PHOTOGRAPH, AND IT APPEARS TO BE THE CORNER OF A BUILDING IN PEOPLE'S 1-A.

Q THANK YOU. GO AHEAD AND HAVE A SEAT.

AT THAT TIME WHEN THE TRUCK STOPPED, THAT'S RIGHT WHEN VALERIE APPROACHED, IT DID YOU SEE HOW MANY PEOPLE WERE IN THE TRUCK?

A THERE WAS ONE.

Q DO YOU REMEMBER IF IT WAS A MAN OR A WOMAN?

[276] A IT WAS A MAN.

Q AND AFTER -- OR WHEN VALERIE APPROACHED THE TRUCK, DO YOU RECALL IF SHE GOT ANYTHING FROM THIS MAN?

A SHE RECEIVED CHANGE FROM HIM.

Q DID YOU HEAR ANY CONVERSATION BETWEEN VALERIE AND THIS MAN?

A NO, I DID NOT.

Q YOU SAW HE GOT CHANGE FROM THE MAN; IS THAT CORRECT?

A YES.

Q AND AFTER VALERIE GOT CHANGE FROM THIS MAN, DID THE TRUCK JUST STAY THERE OR DID IT GO SOMEWHERE ELSE?

A YES. IT MOVED AHEAD TO THE DUMPSTER.

Q SO THE SAME TRUCK WENT TO A DUMPSTER?

A YES.

Q IS THIS DUMPSTER IN THE PARKING LOT?

A YES, IT IS.

Q AND WHAT HAPPENED WHEN THIS TRUCK WENT TO THE DUMPSTER?

A THE MALE GOT OUT AND OPENED THE DUMPSTER DOOR.

Q SORRY?

A THE MALE GOT OUT AND OPENED THE DUMPSTER DOOR.

Q IS THIS THE SAME MAN THAT VALERIE APPEARED TO BE SPEAKING WITH?

A YES.

MS. NAKAKI: IF I MAY, I'M GOING TO HAVE THE WITNESS STEP DOWN.

THE COURT: YES, YOU MAY.

[277] Q BY MS. NAKAKI: YOU MENTIONED THAT THE TRUCK WENT TO A DUMPSTER DID IT STOP THERE?

A YES, IT DID.

Q IN PEOPLE'S 1-A DO YOU SEE THE DUMPSTER WHERE THE TRUCK HAD STOPPED?

A YES, I DO.

Q WOULD YOU DRAW A SQUARE AROUND THE DUMPSTER?

A (COMPLIES).

MS. NAKAKI: THE WITNESS HAS PLACED A SQUARE ON PEOPLE'S 1-A IN THE -- APPROXIMATELY THE MIDDLE OF THE PHOTOGRAPH.

Q IF YOU KNOW, WAS THE TRUCK JUST PARKED THERE AT THAT POINT?

A YES.

Q THIS OLDER TRUCK?

A YES.

Q AND THIS MAN, HE HAD GOTTEN OUT OF THE TRUCK?

A YES, HE DID.

Q WHAT DID YOU SEE THE MAN DOING?

A COLLECTING CARDBOARD.

Q DID YOU SEE ANYTHING IN THE BED OF HIS TRUCK?

A YES, CARDBOARD.

Q THIS MAN THAT WAS AT THE DUMPSTER THAT WAS COLLECTING THE CARDBOARD, WAS HE BASICALLY MINDING HIS OWN BUSINESS?

A YES.

Q WAS THIS A YOUNGER MAN, OLDER MAN?

A OLDER MAN.

[278] Q AT THIS TIME WHEN HE WAS BY THE DUMPSTER, DID YOU SEE HIM INSULTING ANYBODY?

A NO.

Q WAS HE DISRUPTING THE SITUATION IN ANY WAY?

A NO, HE WASN'T.

Q WHERE WERE YOU WHEN YOU SAW THIS MAN COLLECTING THE CARDBOARD FROM THE DUMPSTER?

A I WAS NEAR THE PAY PHONE.

Q WHEN YOU SAY "NEAR THE PAY PHONE," IS THAT BY THE JACK'S MARKET --

A YES, IT IS.

Q -- WHERE YOU CIRCLED ON PEOPLE'S 1-A; IS THAT CORRECT?

A THAT IS CORRECT.

Q YOU COULD SEE THE TRUCK FROM WHERE YOU WERE?

A YES.

Q AND AT THIS POINT WHEN THE TRUCK, THIS OLDER TRUCK IS BY THE DUMPSTER AND YOU SEE THIS MAN COLLECTING CARDBOARD, WHERE IS MR. SOTO?

A STANDING RIGHT THERE (INDICATING).

Q WHEN YOU SAY "STANDING RIGHT THERE," WHERE?

A IN FRONT. IN FRONT OF ME SOMEWHERE. NEAR ME.

Q ABOUT HOW FAR FROM YOU WHEN YOU SAY NEAR YOU?

A FROM MYSELF TO THE DESK.

Q TO THIS DESK HERE (INDICATING)?

A YES.

THE COURT: APPROXIMATELY EIGHT, NINE FEET.

Q BY MS NAKAKI: WHERE IS MR. ALVARADO?

[279] A HE WENT TO THE DONUT STORE.

Q NOW, WHEN PAUL WAS ABOUT NINE FEET AWAY FROM YOU, WHO ELSE WAS STANDING IN THAT AREA, IF ANYBODY?

A IT WAS JASON, DESMOND AND VALERIE.

MR. BERNSTEIN: I DIDN'T HEAR THE LAST NAME.

THE WITNESS: JASON, DESMOND AND VALERIE.

Q BY MS. NAKAKI: WHILE YOU, DESMOND, JASON AND VALERIE AND PAUL SOTO WERE IN THIS AREA, DO YOU RECALL IF PAUL SAID ANYTHING?

A YES.

Q WHAT DID PAUL SAY?

A "LET'S JACK."

Q "LET'S" --

A JACK. "LET'S JACK."

Q WHEN HE SAID "LET'S JACK," WAS HE REFERRING OR IN ANY WAY INDICATING WHO OR WHO HE WAS REFERRING TO?

A YEAH.

Q WHO OR WHAT WAS HE REFERRING TO?

A REFERRING TOWARDS THE TRUCK.

Q THAT'S A TRUCK BY THE DUMPSTER?

A YES.

Q CAN YOU TELL US WHAT "JACK" MEANS?

A IT MEANS TO STEAL.

Q NOW, AT THIS POINT WHEN HE -- WHEN PAUL MADE THIS COMMENT, "LET'S JACK," YOU WERE STANDING THERE; IS THAT CORRECT?

A YES.

Q AND YOU HEARD HIM?

[280] A YES.

Q AND DESMOND WAS STANDING THERE?

A YES.

Q WAS HE STANDING OR SITTING, IF YOU RECALL?

A HE WAS SITTING.

Q AND VALERIE WAS THERE?

A YES.

Q DO YOU REMEMBER WHERE SHE WAS?

A NEXT TO JASON AND DESMOND.

Q AND JASON WAS NEXT TO WHO?

A TO VALERIE.

Q NOW, WHEN PAUL SAID "LET'S JACK," DID YOU DO ANYTHING?

A NO.

Q DID YOU SAY ANYTHING TO HIM?

A NO, I DID NOT.

Q DID DESMOND DO ANYTHING?

A NO.

Q DID JASON DO ANYTHING?

A NO.

Q DID VALERIE DO ANYTHING?

A JUST -- NO.

Q NOW, AT THIS POINT WHEN NOBODY DID ANYTHING, WHAT DID PAUL DO?

A STAYED QUIET.

Q DID HE AGAIN -- OR DID HE SAY ANYTHING ELSE?

A YES.

Q WHO DID HE SAY?

[281] A HE REPEATED IT.

Q WHEN YOU SAY "HE REPEATED IT," WHAT DID PAUL REPEAT?

A "LET'S JACK."

Q WHEN HE REPEATED "LET'S JACK," WHO WAS PRESENT WHEN HE SAID IT THE SECOND TIME?

A MYSELF, JASON, DESMOND, VALERIE AND MIKE.

Q SO THE SECOND TIME -- I'M GOING TO BACK UP.

THE FIRST TIME HE SAYS "LET'S JACK" BASICALLY NOBODY THAT WAS OUT THERE DOES ANYTHING. YOU DON'T DO ANYTHING, JASON DOESN'T DO ANYTHING, DESMOND DOESN'T DO ANYTHING AND VALERIE DOESN'T DO ANYTHING; IS THAT CORRECT?

A THAT'S CORRECT.

Q AT SOME POINT YOU INDICATED MIKE IS NOW PRESENT; IS THAT CORRECT?

A YES.

Q HOW MUCH TIME PASSED BETWEEN THE FIRST TIME PAUL SAID "LET'S JACK" TO THE SECOND TIME HE SAID " LET'S JACK"?

A NO MORE THAN TWO MINUTES.

Q AND IT WAS DURING THIS TWO MINUTE TIME FRAME THAT MIKE COMES BACK TO THE GROUP; IS THAT CORRECT?

A YES.

Q AND THE SECOND TIME THAT PAUL SAYS "LET'S JACK," JUST SO THAT WE ARE CLEAR, WHO WAS PRESENT THE SECOND TIME THAT PAUL SAYS "LET'S JACK"?

A MYSELF, MIKE, DESMOND, JASON AND VALERIE.

Q SO IN OTHER WORDS, THE SAME GROUP, BUT MIKE [282] HAS NOW JOINED THE GROUP THE SECOND TIME?

A YES.

Q FOR THE RECORD, MIKE BEING MR. ALVARADO, THE PERSON YOU IDENTIFIED IN COURT?

A YES.

Q NOW, WHEN PAUL SAYS THIS THE SECOND TIME, "LET'S JACK," DID ANYBODY AGREE TO GO WITH PAUL?

A YES.

Q WHO AGREED TO GO WITH PAUL TO GO JACK?

A MIKE.

Q MIKE BEING MR. ALVARADO, THE PERSON YOU'VE IDENTIFIED IN COURT TODAY?

A YES.

Q NOW, YOU SAID THAT MIKE AGREED TO GO WITH PAUL. DID MIKE SAY SOMETHING?

A YEAH.

Q WHAT DID MIKE SAY?

A "LET'S GO."

Q WHEN MIKE AGREED TO GO AND HE SAID "LET'S GO," AFTER PAUL ASKED THE SECOND TIME "LET'S JACK," WHERE WAS EVERYONE? AND BY "EVERYONE," I MEAN, WHERE WERE YOU WHEN MIKE SAID "LET'S GO"?

A WHERE WERE ALL JUST STANDING.

Q STILL BY THE PHONES?

A YES.

Q WHERE WAS DESMOND?

A STILL IN THE SAME SPOT.

Q BY THE PHONES?

[283] A UH-HUH.

Q WHERE WAS JASON?

A IN THE SAME SPOT.

Q WHERE WAS VALERIE?

A SAME.

Q AND MIKE ALSO WAS BY THE PHONES?

A YES.

Q HOW FAR WERE YOU FROM MIKE WHEN HE SAID "LET'S GO"?

A NO FURTHER THAN I AM TO HER (INDICATING).

Q "HER," YOU'RE REFERRING TO THE COURT REPORTER?

A YES.

THE COURT: FOUR FEET.

Q BY MS. NAKAKI: WHERE WAS PAUL WHEN HE SAID "LET'S JACK" THE SECOND TIME, HOW FAR WAS HE FROM YOU?

A EXCUSE ME?

Q THE SECOND TIME THAT PAUL SAID "LET'S JACK" TO THE GROUP WHEN MIKE WAS THERE THE SECOND TIME, HOW FAR WAS PAUL FROM YOU?

A SAME DISTANCE.

Q AND HOW FAR APART WERE PAUL AND MIKE WHEN THE SECOND CONVERSATION TOOK PLACE "LET'S JACK," WHEN MIKE SAYING "LET'S GO"?

A FROM MYSELF TO THE DESK.

MS. NAKAKI: APPROXIMATELY NINE FEET, YOUR HONOR?

THE COURT: YES.

Q BY MS. NAKAKI: WHEN THIS AGREEMENT WAS MADE, PAUL SAYING "LET'S JACK" THE SECOND TIME AND MIKE SAYING [284] "LET'S GO," EVERYONE IS STILL BY THE PHONES; IS THAT CORRECT?

A THAT IS CORRECT.

Q SO NOBODY HAS MOVED AT THAT POINT?

A CORRECT.

Q FOLLOWING THIS AGREEMENT BY MIKE, "LET'S GO," AFTER PAUL SAID "LET'S JACK," WHAT HAPPENED?

A A SMALL AMOUNT OF TIME HAD PASSED, AND THEN THEY STARTED WALKING TOWARDS THE TRUCK.

Q YOU SAID A SMALL AMOUNT OF TIME HAD PASSED. SO THERE WAS A PAUSE AFTER THIS EXCHANGE, "LET'S JACK" BY PAUL AND MIKE SAYING "LET'S GO"; IS THAT CORRECT?

A YES.

Q DO YOU RECALL IF PAUL SAID ANYTHING ELSE TO MIKE?

A "I'LL GIVE YOU HALF."

Q WHEN PAUL SAID "I'LL GIVE YOU HALF," WAS HE DIRECTING THAT TO MIKE OR SOMEONE ELSE IN THE GROUP?

A TO MIKE.

Q AND WHEN PAUL SAID "I'LL GIVE YOU HALF" TO MIKE, WERE THEY STILL STANDING -- AND I'M REFERRING TO PAUL AND MIKE, WERE THEY STILL

STANDING IN THE GROUP BY THE PHONES AT JACK'S MARKET?

A YES.

Q THIS SMALL AMOUNT OF TIME BETWEEN THE STATEMENTS, AND THEN SOMETHING ELSE HAPPENING, APPROXIMATELY HOW MUCH TIME WAS THAT?

A ABOUT HALF A MINUTE.

[285] Q SO AFTER PAUL SAYS "LET'S JACK," MIKE SAYS "LET'S GO," PAUL SAYS " I'LL GIVE YOU HALF" TO MIKE, APPROXIMATELY HALF A MINUTE LATER SOMETHING ELSE HAPPENS; IS THAT CORRECT?

A YES.

Q WHAT HAPPENED?

A THEY BOTH WALKED TOWARDS THE TRUCK.

Q WHEN YOU SAY "THEY BOTH WALKED TOWARDS THE TRUCK," WHO ARE YOU TALKING ABOUT?

A PAUL AND MIKE.

Q WHEN PAUL AND MIKE WALKED TOWARDS THE TRUCK, ARE YOU TALKING ABOUT THE TRUCK THAT WAS PARKED AT THE DUMPSTER?

A YES.

Q AND IF YOU REMEMBER, WERE PAUL AND MIKE WALKING SIDE BY SIDE ONE IN FRONT OF THE OTHER?

A ONE IN FRONT OF THE OTHER.

Q AND WHO WAS IN FRONT?

A PAUL.

Q AND WAS MIKE DIRECTLY IN BACK OF PAUL OR WAS HE TO THE SIDE, IF YOU RECALL?

A TO THE SIDE.

Q DID YOU SEE WHERE PAUL WENT?

A TOWARDS THE DRIVER'S SIDE.

Q AND WHEN YOU SAY DRIVER'S SIDE, THE DRIVER SIDE OF THIS TRUCK?

A YES.

Q AND IF YOU REMEMBER, WHERE DID MIKE GO?

[286] A TOWARDS THE PASSENGER SIDE.

MS. NAKAKI: AND, AGAIN, I'LL HAVE THE WITNESS STEP DOWN, YOUR HONOR.

Q LOOKING AT PEOPLE'S 1-A WHERE YOU'VE DRAWN A CIRCLE HERE AT THE STOP OF THE PHOTOGRAPH AND THEN THE SQUARE, DO YOU SEE THE TWO ORANGE MARKINGS YOU PUT ON PEOPLE'S 1-A?

A YES, I DO.

Q WHEN YOU SAID THAT PAUL AND MIKE WALKED TOWARDS THE TRUCK, ARE YOU TALKING ABOUT GOING FROM THIS AREA? AND I'M POINTING

AT THE CIRCLE YOU DREW ON PEOPLE'S 1-A TO THE SQUARE WHERE THE DUMPSTER IS, THE ORANGE SQUARE YOU'VE MARKED IN PEOPLE'S 1-A, IS THAT THE PATH TAKEN TO THE TRUCK BY PAUL AND MIKE?

A YES.

Q YOU CAN HAVE A SEAT.

AND WHEN YOU SAW PAUL AND MIKE GOING TOWARDS THE TRUCK THAT WAS BY THE DUMPSTER, DO YOU REMEMBER IF EITHER OF THEM WERE RUNNING OR WALKING? CAN YOU DESCRIBE THAT FOR US?

A WALKING.

Q AND APPROXIMATELY HOW LONG DID IT TAKE FOR PAUL AND MIKE TO GET TO THE TRUCK AT THE DUMPSTER, IF YOU REMEMBER?

A NO, I DON'T.

Q THEY WERE WALKING AT A REGULAR PACE; IS THAT CORRECT?

A YES.

[287] Q DO YOU KNOW THE APPROXIMATE DISTANCE FROM WHERE THE PAY PHONES WERE TO THE DUMPSTER?

A NO, I DO NOT.

Q WAS IT THE APPROXIMATE LENGTH OF THIS COURTROOM OR FURTHER?

A IT'S FURTHER.

Q NOW, YOU SAID THAT PAUL WENT TO THE DRIVER'S SIDE OF THE TRUCK; IS THAT CORRECT?

A YES.

Q YOU STATED EARLIER THAT THE MAN THAT WAS IN THE TRUCK WAS AT THE DUMPSTER; IS THAT RIGHT?

A YES.

Q WAS THE MAN CLOSER TO THE DRIVER'S SIDE OF THIS TRUCK OR THE PASSENGER SIDE OF HIS TRUCK?

A THE DRIVER'S SIDE.

Q AND WHEN YOU SAW PAUL APPROACH THE DRIVER'S SIDE, WHERE WAS THE MAN?

A NEAR THE OPENING OF THE DUMPSTER.

Q AND THE DRIVER'S SIDE OF THE TRUCK WAS NEAR THE OPENING OF THE DUMPSTER; THAT'S CORRECT?

A THAT'S CORRECT.

Q WHEN PAUL WAS APPROACHING THE DRIVER'S SIDE OF THE TRUCK, DID YOU SEE WHAT THE MAN WAS DOING?

A SEARCHING FOR CARDBOARD.

Q SO HE WAS IN THE DUMPSTER AREA?

A YES.

Q AND DO YOU REMEMBER WHAT MIKE WAS DOING OR WHERE MIKE WAS AS PAUL WAS APPROACHING THE DRIVER'S SIDE?

[288] A NEAR THE PASSENGER SIDE.

Q MIKE WAS NEAR THE PASSENGER SIDE?

A YES.

Q I'LL BACK UP. LET ME REPHRASE THAT.

MIKE WAS ON THE PASSENGER SIDE; IS THAT CORRECT?

A THAT IS CORRECT.

Q PAUL WAS ON THE DRIVER'S SIDE?

A YES.

Q AND DO YOU REMEMBER APPROXIMATELY WHERE MIKE WAS ON THE PASSENGER SIDE WHEN PAUL WAS GOING TO THE DRIVER'S SIDE?

A NEAR THE RIGHT TIRE, THE REAR TIRE.

Q WHEN PAUL APPROACHED THE DRIVER'S SIDE OF THE TRUCK, DO YOU RECALL HOW FAR OR

WHERE RELATIVE TO THE DRIVER'S SIDE OF THE TRUCK PAUL WAS?

A NO, I DON'T.

Q DO YOU REMEMBER IF HE WAS BY THE BACK OF THE TRUCK BY THE DRIVER'S DOOR BY THE FRONT OF THE TRUCK?

A BY THE DOOR.

Q BY THE DRIVER'S DOOR?

A YES.

Q AND WHEN YOU SAW PAUL BY THE DRIVER'S DOOR, WHERE WAS THE MAN THAT WAS AT THE DUMPSTER?

A IN BETWEEN THE DRIVER'S DOOR AND THE DUMPSTER DOOR.

Q IF YOU COULD TELL, APPROXIMATELY HOW CLOSE WAS PAUL TO THE MAN AT THE DUMPSTER?

[289] A I DON'T KNOW.

Q WAS IT FROM WHERE I AM TO WHERE YOU WERE, WHICH IS PROBABLY ABOUT 15 FEET?

A NO.

Q WAS IT CLOSER?

A YES.

Q AND WHERE THIS COURT REPORTER IS TO WHERE YOU WERE, COULD YOU TELL IF THE DISTANCE BETWEEN PAUL AND THE MAN WAS ABOUT THE SAME OR CLOSER?

A ABOUT THE SAME.

MS. NAKAKI: THAT WOULD BE ABOUT FOUR FEET, YOUR HONOR?

THE COURT: THAT WAS FOUR FEET.

Q BY MS. NAKAKI: NOW, WHEN PAUL WAS ABOUT APPROXIMATELY FOUR FEET FROM THIS MAN, DID IT APPEAR THAT PAUL WAS SAYING ANYTHING OR COULD YOU TELL WHETHER HE WAS SAYING ANYTHING TO THIS MAN?

A IT LOOKED LIKE HE WAS SAYING SOMETHING.

Q THERE APPEARED TO BE SOME SORT OF CONVERSATION BETWEEN THE MAN AND PAUL; IS THAT CORRECT?

A THAT IS CORRECT.

Q WHEN THIS IS GOING ON, MIKE IS STILL IN THE PASSENGER SIDE?

A THAT IS CORRECT.

Q AND HE'S BY THE RIGHT REAR PASSENGER SIDE?

A YES.

MR. GUTIERREZ: OBJECTION, YOUR HONOR. RIGHT REAR TIRE.

[290] THE COURT: SUSTAINED.

REPHRASE.

Q BY MS. NAKAKI: RIGHT REAR TIRE?

A YES.

MS. NAKAKI: YOUR HONOR, I'LL ASK THE WITNESS STEP DOWN AND SEE IF I CAN CLEAR THIS UP. I'LL HAVE THE WITNESS LOOK AT PEOPLE'S 1-C.

Q SEE THE PHOTOGRAPH MARKED PEOPLE'S 1-C APPEARS TO HAVE A TRUCK AND A LITTLE BUILDING THERE TO THE LEFT.

DO YOU SEE THAT?

A YES.

Q DO YOU RECOGNIZE WHAT IS DEPICTED IN THAT PHOTOGRAPH?

A YES, I DO.

Q AND YOU HAD BEEN REFERENCING A DUMPSTER THAT YOU SAW THAT EVENING. IS THAT DUMPSTER DEPICTED IN PEOPLE'S 1-C?

A YES, IT IS.

Q FOR THE RECORD, I'LL HAVE YOU CIRCLE WITH THIS BROWN PEN.

MS. NAKAKI: THE WITNESS HAS PLACED A CIRCLE ON PEOPLE'S 1-C.

Q THERE APPEARS TO BE A TRUCK TO THE RIGHT OF THAT DUMPSTER, A WHITE PICKUP TRUCK. DOES THAT TRUCK LOOK FAMILIAR TO YOU?

A SOMEWHAT, YES.

Q DOES IT LOOK SOMEWHAT LIKE THE TRUCK YOU SAW ON SEPTEMBER 23, 1995?

[291] A YEAH.

Q WHEN YOU SAID YOU RECALL MIKE BEING AT THE RIGHT REAR TIRE, WHY DON'T YOU GO AHEAD AND PLACE AN X IN APPROXIMATELY THE LOCATION WHERE YOU SAW MIKE WHEN PAUL WAS AT THE DRIVER'S SIDE?

A (COMPLIES).

MS. NAKAKI: THE WITNESS PLACED AN X ON PEOPLE'S 1-C. IT APPEARS TO BE TO THE RIGHT OF THE RIGHT REAR TIRE.

THE COURT: VERY WELL.

Q BY MS. NAKAKI: YOU STATED YOU SAW WHAT YOU SAID APPEARED TO BE A CONVERSATION BETWEEN PAUL AND THE MAN AT THE DUMPSTER. ABOUT HOW LONG DID THIS -- WHAT APPEARED TO BE A CONVERSATION -- GO ON?

A NOT TOO LONG.

Q WHEN YOU SAY "NOT TOO LONG," TEN MINUTES?

A SHORTER TIME.

Q ONE MINUTE?

A ABOUT HALF A MINUTE.

Q COULD YOU ACTUALLY SEE THIS MAN TALKING BACK? COULD YOU SEE WHAT THE MAN WAS DOING WHILE THIS APPARENT CONVERSATION WAS GOING ON?

A NO.

Q YOU COULDN'T SEE THE MAN AT ALL?

A NO.

Q IF YOU COULD NOT SEE THE MAN, HOW COULD YOU TELL THERE WAS APPARENTLY A CONVERSATION BETWEEN PAUL AND THE MAN?

[292] A I COULD NOT.

Q YOU COULDN'T?

A NO.

Q HOW DID IT APPEAR TO YOU PAUL WAS IN A CONVERSATION WITH SOMEONE?

A HAND MOVEMENT.

Q SORRY?

A HAND MOVEMENT.

Q HE WAS -- PAUL WAS GESTURING?

A YES.

Q IT APPEARED HE WAS GESTURING TOWARDS SOMEBODY OR AT SOMEBODY?

A YES.

Q AFTER THIS HALF A MINUTE OF WHAT PERIOD TO BE A CONVERSATION, THIS GESTURE BY PAUL, WHAT HAPPENED?

A THERE WAS A SHOT.

Q SO YOUR HEARD SOMETHING IS THAT RIGHT?

A YES.

Q YOU SAID A SHOT. IT SOUNDED LIKE A GUNSHOT TO YOU?

A YES.

Q WHEN YOU HEARD THIS GUNSHOT, WHERE WERE YOU?

A NEAR THE PHONES.

Q YOU SAY "NEAR THE PHONES." ARE YOU REFERRING TO THE PHONES BY JACK'S MARKET?

A YES.

Q AND WHERE WAS DESMOND?

A ALSO NEAR THE PHONES.

[293] Q AT THE TIME OF THE GUNSHOT?

A YES.

Q WHERE WAS VALERIE AT THE TIME THE GUNSHOT?

A NEITHER PHONES.

Q HOW ABOUT JASON?

A HE WAS ALSO NEAR THE PHONES.

Q WHAT HAPPENED -- WHAT DID YOU DO AFTER YOU HEARD THIS GUNSHOT?

A I RAN.

Q DID YOU SEE IF ANYONE HAD BEEN SHOT?

A NO, I DID NOT SEE.

Q SO YOU JUST STARTED RUNNING?

A YES.

Q AND WHERE DID YOU RUN TO?

A I RAN TO MY HOUSE.

Q DID ANYBODY ELSE RUN TO YOUR HOUSE?

A YES.

Q WHO?

A VALERIE, JASON, DESMOND, PAUL AND MIKE.

Q BASICALLY EVERYONE WENT BACK TO YOUR HOUSE; IS THAT CORRECT?

A THAT IS CORRECT.

Q NOW, WHEN EVERYONE CAME BACK TO YOUR HOUSE, DID YOU SEE PAUL AT YOUR HOUSE --

A YES.

Q -- WHEN THEY CAME BACK OR WHEN PAUL CAME BACK?

AND DID YOU NOTICE ANYTHING ON HIS CLOTHES WHEN HE CAME BACK TO YOUR HOUSE AFTER HE HEARD THE GUNSHOT?

[294] A YES.

Q WHAT DID YOU NOTICE ABOUT PAUL'S CLOTHES?

A THERE WAS BLOOD.

Q AND ON PART OF PAUL'S CLOTHING DID YOU SEE BLOOD?

A ON HIS SLEEVE.

Q HIS SLEEVE TO HIS SHIRT?

A YES.

Q WAS IT LONG-SLEEVED OR SHORT-SLEEVED?

A SHORT SLEEVE.

Q IF YOU REMEMBER, WAS IT LIKE A DRESS SHIRT OR T-SHIRT OR SWEATER, IF YOU REMEMBER?

A T-SHIRT.

Q AND THIS BLOOD THAT WAS ON THE T-SHIRT, DO YOU RECALL IF THE T-SHIRT WAS A LIGHT-COLORED T-SHIRT, DARK-COLORED T-SHIRT?

A LIGHT.

Q AND DID YOU SEE WHERE PAUL WENT AFTER HE CAME BACK TO YOUR HOUSE?

A INTO MY ROOM.

Q WHAT DID PAUL DO WHEN HE WENT INTO YOUR ROOM?

A TOOK OFF HIS SHIRT.

Q THIS IS THE SHIRT WITH BLOOD ON IT?

A YES.

Q AND WHAT DID PAUL DO AFTER HE TOOK OFF THE SHIRT WITH BLOOD ON IT?

A HE DROPPED IT ON THE FLOOR.

MS. NAKAKI: YOUR HONOR, MAY I HAVE ONE MOMENT? [295] YOUR HONOR, IF I MAY HAVE JUST ONE MINUTE.

Q SO AFTER PAUL TOOK OFF HIS SHIRT, HE PUT IT ON THE FLOOR; IS THAT WHAT YOU SAID?

A YES.

Q AND WHAT DID HE DO AFTER HE TOOK OFF HIS SHIRT?

A HE DROPPED THE GUN.

Q YOU SAW A GUN?

A YES.

Q AND PAUL HAD THIS GUN?

A YES.

Q CAN YOU DESCRIBE THIS GUN FOR US?

A BLACK, LONG.

Q SORRY?

A BLACK AND LONG.

Q WHEN YOU SAY LONG, ARE YOU REFERRING TO --

A THE BARREL.

Q IF YOU KNOW, WAS IT A SEMI-AUTOMATIC A REVOLVER, DO YOU KNOW?

A A REVOLVER.

Q YOU MENTIONED THAT YOU SAW BLOOD ON THE SLEEVE OF A LIGHT-COLORED T-SHIRT. DO YOU REMEMBER SEEING BLOOD ANYWHERE ELSE ON PAUL?

A NO, I DON'T REMEMBER.

Q IF YOU REMEMBER, DID HE DRY TO CLEAN UP OR WASH UP, ANYTHING LIKE THAT?

A YES.

Q WHERE WAS THAT?

[296] A IN MY BATHROOM.

MS. NAKAKI: YOUR HONOR, IF I MAY JUST HAVE A MOMENT.

Q YOU SAID YOU DROPPED THIS GUN, THE LONG-BARRELED REVOLVER, WHERE DID YOU DROP IT?

A FROM MY KNOWLEDGE, DROPPED IT UNDER MY BED.

Q DID YOU ACTUALLY SEE HIM DROP IT UNDER YOUR BED?

A NO, DID I NOT.

Q DID YOU ACTUALLY SEE PAUL WITH THIS GUN?

A NO.

Q YOU NEVER SAW IT IN HIS POSSESSION?

A NO.

Q IF I MAY ASK, HOW DID YOU KNOW IT WAS PAUL'S GUN?

A NO ONE ELSE HAD IT. NO ONE ELSE, TO MY KNOWLEDGE, HAD ANYTHING ON THEM.

Q HOW IS IT THAT YOU WERE AWARE THAT PAUL HAD A GUN?

A I WAS NOT AWARE.

Q DID PAUL SAY ANYTHING TO YOU ABOUT WHAT HAD HAPPENED AT THE PARKING LOT IN THE SHOPPING CENTER?

A NO.

Q NOW, YOU HAD BEEN INTERVIEWED BACK IN OCTOBER OF 1995 BY THE SHERIFFS, THE DETECTIVES. DETECTIVE COMSTOCK, FOR THE RECORD, IS IN THE COURTROOM AS THE I.O. DO YOU REMEMBER THAT?

A YES, I DO.

Q AND DID PAUL SAY ANYTHING TO YOU ABOUT WHAT [297] HAPPENED IN THE PARKING LOT?

A NO, HE DID NOT.

Q DO YOU RECALL TELLING THE DETECTIVES THAT PAUL TOLD YOU ABOUT WHAT HAPPENED OUT IN THE PARKING LOT?

A NO, I DON'T REMEMBER.

Q WOULD IT PERHAPS ASSIST YOU TO LOOK AT A TRANSCRIPT OF AN INTERVIEW BY DETECTIVE COMSTOCK AND DETECTIVE LEE BACK IN OCTOBER OF 1995 WITH YOU?

A YES.

Q MS. NAKAKI: YOUR HONOR, FOR THE RECORD, I AM GOING TO BE SHOWING THE WITNESS PAGE 7, LINE 28 THROUGH PAGE 8, LINE 8, I'M GOING TO HAVE THE WITNESS READ THAT PORTION, SEE IF IT REFRESHES YOUR MEMORY.

MR. GUTIERREZ: SORRY. PAGE 7, 28 TO --

MS. NAKAKI: PAGE 7, LINE 28 AND PAGE 8 THROUGH LINE 8.

THE COURT: JUST READ THAT TO YOURSELF QUIETLY.

THE WITNESS: (WITNESS COMPLIES).

Q BY MS. NAKAKI: HAVING HAD A CHANCE TO READ PORTIONS OF THE TRANSCRIPT OF THE INTERVIEW, DOES THAT HELP REFRESH YOUR MEMORY?

A YES.

Q THAT EVENING DID PAUL TELL YOU WHAT HAD HAPPENED OUT IN THE PARKING LOT? AND BY "THE PARKING LOT," I'M REFERRING TO THE SHOPPING CENTER RIGHT BEHIND YOUR HOUSE.

A YES.

Q WHAT DID PAUL TELL YOU?

[298] A AGAIN, HIS DEMAND FOR MONEY AND THE KEYS TO HIS CAR.

Q DID PAUL TELL YOU WHETHER OR NOT THE MAN GAVE HIM THE MONEY AND THE KEYS TO HIS CAR?

A NO, HE DID NOT.

Q AND DID PAUL TELL YOU WHAT HE DID AFTER HE TOLD THE MAN -- OR MADE THE DEMAND FOR MONEY AND THE KEYS TO HIS CAR?

A SHOT HIM.

Q PAUL TOLD YOU THAT HE SHOT HIM; IS THAT CORRECT?

A NO, HE DID NOT SAY THAT.

Q LET'S BACK UP. WHAT DID PAUL TELL YOU AFTER YOU HEARD THE GUNSHOT IN THE SHOPPING CENTER AND YOU ALL WENT BACK TO YOUR HOUSE? WHAT DID PAUL TELL YOU HAPPENED OUT THERE IN THE PARKING LOT?

A THAT HE DID NOT GIVE HIM THE MONEY OR THE KEYS TO THE CAR.

Q SO PAUL TOLD YOU -- IF I CAN CLARIFY THIS -- THAT HE ASKED FOR THE MONEY AND THE KEYS TO THE CAR AND THE MAN DIDN'T GIVE HIM THE MONEY AND THE KEYS TO THE CAR; IS THAT CORRECT?

A THAT IS CORRECT.

Q THAT'S WHAT PAUL TOLD YOU?

A YES.

Q NOW, YOU HAD MENTIONED THAT PAUL HAD BLOOD ON HIS SLEEVE. DID ANYBODY ELSE THAT CAME BACK TO YOUR HOUSE AFTER HEARING A GUNSHOT HAVE BLOOD ON HIM? DID MIKE HAVE [299] BLOOD ON HIM?

A. NO.

Q DID JASON HAVE BLOOD ON HIM?

A NO.

Q DID VALERIE HAVE BLOOD ON HER?

A NO.

Q DID DESMOND HAVE BLOOD ON HIM?

A NO.

Q DID YOU HAVE BLOOD ON YOU?

A NO.

Q JUST PAUL SOTO HAD BLOOD ON HIM?

A YES.

Q YOU NEVER SAW MR. SOTO WITH A GUN, BUT AT SOME POINT YOU BECAME AWARE THERE WAS A GUN UNDER YOUR BED; IS THAT CORRECT?

A YES.

Q AND DID PAUL SAY ANYTHING TO YOU ABOUT THE GUN UNDER YOUR BED?

A NO.

Q DID PAUL SAY ANYTHING TO YOU ABOUT DISCUSSING OR SAYING ANYTHING ABOUT WHAT

OCCURRED OUT IN THE PARKING LOT AT THE SHOPPING CENTER BEHIND YOUR HOUSE?

A NO.

Q DO YOU RECALL DURING THE INTERVIEW BACK IN OCTOBER OF 1995 TELLING THE DETECTIVES THAT PAUL HAD MENTIONED SOMETHING ABOUT NOT SAYING ANYTHING?

MR. GUTIERREZ: OBJECTION, YOUR HONOR; LEADING.

THE COURT: SUSTAINED.

[300] Q BY MS. NAKAKI: WOULD IT REFRESH YOUR MEMORY OR ASSIST YOU IF YOU HAD AN OPPORTUNITY TO REVIEW A TRANSCRIPT OF YOUR INTERVIEW OF OCTOBER 1995 WITH DETECTIVE COMSTOCK AND LEE AS TO WHETHER OR NOT PAUL SAID SOMETHING TO YOU ABOUT DISCUSSING ANYTHING THAT WENT ON OUT IN THE PARKING LOT?

A YES.

MS. NAKAKI: FOR THE RECORD, I'LL SHOW THE WITNESS PAGE 21, LINES 22 THROUGH 26, AND PAGE 26, LINES 19 AND 20.

THE COURT: VERY WELL.

MR. RIVERA, I WOULD LIKE YOU TO READ ON THIS PAGE, PAGE 21, LINES 22 THROUGH 26.

A (COMPLIES).

Q AND THEN SHOWING THE WITNESS PAGE 26 LINES 19 AND 20.

A (COMPLIES).

Q DID YOU HAVE AN OPPORTUNITY TO REVIEW THOSE TWO PAGES?

A (INDICATES BY NODDING HEAD UP AND DOWN).

Q DOES THAT REFRESH YOUR MEMORY AS TO WHETHER OR NOT PAUL HAD SAID ANYTHING TO YOU OR ANYONE ELSE ABOUT DISCUSSING WHAT

HAPPENED OUT THERE IN THE PARKING LOT AT THE SHOPPING CENTER?

A YES.

Q WHAT DID PAUL SAY?

A "DON'T SAY ANYTHING."

Q IS THAT WHAT HE TOLD YOU, "DON'T SAY ANYTHING"?

[301] A YES.

Q WERE THOSE HIS EXACT WORDS?

A NO.

Q WHAT WERE HIS EXACT WORDS?

A "DON'T SAY SHIT."

Q AND CAN YOU DESCRIBE THE TONE OF VOICE WHEN HE SAID IT? WAS HE JOKING OR SERIOUS?

A SERIOUS.

Q YOU INDICATED EARLIER THAT YOU NEVER SAW PAUL WITH THE GUN; IS THAT RIGHT?

A THAT IS CORRECT.

Q DO YOU RECALL SAYING SOMETHING DIFFERENTLY TO THE DETECTIVES IN AN OCTOBER 1995 INTERVIEW?

A NO, I DON'T.

Q WOULD IT ASSIST YOU --

A I DON'T RECALL.

Q I'M SORRY.

MS. NAKAKI: I STEPPED ON THE WITNESS' STATEMENT.

THE WITNESS: NO, I DON'T RECALL.

Q BY MS. NAKAKI: WOULD IT ASSIST YOU TO REVIEW YOUR TRANSCRIPT OF OCTOBER OF 1995 OF THE INTERVIEW?

A YES.

MS. NAKAKI: I'LL SHOW THE WITNESS PAGE 21, LINES 19 THROUGH 21.

A (COMPLIES).

Q DOES THAT HELP YOU, SIR?

A YES.

Q DO YOU RECALL WHETHER OR NOT PAUL -- OR [302] WHETHER OR NOT YOU SAW PAUL WITH A GUN THAT EVENING WHEN YOU ALL WERE BACK AT THE HOUSE AFTER THE INCIDENT AT THE PARKING LOT?

A YES.

Q AND DID YOU SEE PAUL WITH THE GUN?

A YES.

Q WHERE DID YOU SEE PAUL WITH THE GUN?

A IN MY BEDROOM.

Q WAS PAUL HOLDING THE GUN?

A YES, HE WAS.

Q DO YOU REMEMBER WHICH HAND PAUL WAS HOLDING THE GUN IN?

A NO, I DON'T.

Q BUT YOU DID NOT SEE WHAT PAUL DID WITH THE GUN AFTER YOU SAW IT IN HIS HAND; IS THAT CORRECT?

A THAT IS CORRECT.

Q NOW, YOU HAD STATED THAT AT SOME POINT YOU BECAME AWARE THERE WAS A GUN UNDER YOUR BED, CORRECT?

A THAT IS CORRECT.

Q WAS THIS THE SAME GUN YOU SAW PAUL HAVE IN HIS HAND?

A YES.

Q WHAT DID YOU DO WITH THAT GUN?

A WE HID IT.

Q WHEN YOU SAY "WE HID IT," WHO HID IT?

A MYSELF AND MIKE AND PAUL.

Q WHO ACTUALLY TOOK THE GUN?

A PAUL.

[303] Q WHAT DID PAUL DO WITH THE GUN, IF YOU KNOW?

A WE TOOK IT TO THE PARK.

Q WHEN YOU SAY "WE HID IT," PAUL TOOK THE GUN, YOU WENT WITH HIM, CORRECT?

A YES.

Q AND MIKE WENT WITH HIM?

A YES.

Q DO YOU KNOW THE NAME OF THE PARK?

A THE LAKEVIEW PARK.

Q NOW, MR. RIVERA, THERE'S A GENTLEMAN SITTING IN COURT TODAY, THE DISTINGUISHED GENTLEMAN HERE IN THE BLUE SUIT?

A YES.

Q DO YOU RECOGNIZE HIM?

A YES, I DO.

Q MS. NAKAKI: FOR THE RECORD, THIS IS MR. WILSON.

Q AT ANY TIME DID YOU REQUEST OF THE D.A. OFFICE OR ANYBODY TO HAVE AN ATTORNEY REPRESENT YOU?

A NO, I DID NOT.

Q HOWEVER, AT THE DIRECTION OF THE COURT YOU WERE ASKED TO SPEAK WITH AN ATTORNEY, CORRECT?

A THAT IS CORRECT.

Q YOU AT NO TIME ASKED FOR AN ATTORNEY, CORRECT?

A CORRECT.

MS. NAKAKI: AND FOR THE RECORD, MR. WILSON IS AN ATTORNEY?

THE COURT: YES, FOR THE RECORD, MR. WILSON IS AN ATTORNEY.

[304] Q BY MS. NAKAKI: DID YOU SPEAK WITH MR. WILSON?

A YES, I DID.

Q AND PRIOR TO TODAY YOU SPOKE WITH ME REGARDING THIS CASE, CORRECT?

A THAT'S CORRECT.

Q AND YOU WERE WILLING TO TESTIFY IN THIS CASE, CORRECT?

MR. GUTIERREZ: OBJECTION, YOUR HONOR; LEADING.

THE COURT: OVERRULED.

THE WITNESS: CORRECT.

Q BY MS. NAKAKI: AND YOU WERE WILLING TO TESTIFY WITHOUT SPEAKING WITH AN ATTORNEY, CORRECT?

A CORRECT.

Q AND JUST SO THAT WE ARE CLEAR, YOU'RE AWARE THAT YOU WERE GRANTED WHAT IS CALLED IMMUNITY FOR YOUR TESTIMONY TODAY?

A YES.

Q DID YOU REQUEST OF THE D.A. OFFICE OR OF THE COURT TO HAVE IMMUNITY TO TESTIFY TODAY?

A NO, I DID NOT.

Q IN OTHER WORDS, YOU WERE WILLING TO TESTIFY WITHOUT ANY IMMUNITY TODAY, CORRECT?

A THAT'S CORRECT.

Q HOWEVER, YOU WERE GRANTED IMMUNITY. AND WHY WAS THAT, MR. RIVERA?

MR. GUTIERREZ: OBJECTION; CALLS FOR A LEGAL CONCLUSION.

THE COURT: SUSTAINED.

[305] Q DID MR. WILSON RECOMMEND TO YOU TO -- LET ME BACK UP HERE.

DID MR. WILSON --

MR. GUTIERREZ: YOUR HONOR, I'LL OBJECT ON FOUNDATION GROUNDS JUST BY THE PRELIMINARY FORM OF THE QUESTION.

MR. BERNSTEIN: ALSO JOIN; HEARSAY.

THE COURT: VERY WELL.

Q BY MS. NAKAKI: JUST SO THAT WE ARE CLEAR, MR. RIVERA, TODAY YOU WOULD HAVE COME TO COURT AND TESTIFIED OUT ANY GRANT OF IMMUNITY, RIGHT?

MR. GUTIERREZ: OBJECTION; ASKED AND ANSWERED.

THE COURT: OVERRRULED.

THE WITNESS: YES.

Q BY MS. NAKAKI: NOW, YOU IDENTIFIED TWO MEN IN COURT TODAY, PAUL SOTO AND MICHAEL ALVARADO, CORRECT?

A YES.

Q MICHAEL ALVARADO ACTUALLY IS A -- WAS A PRETTY GOOD FRIEND OF YOURS, CORRECT?

A YES.

Q AND IN SEPTEMBER -- LET'S TALK ABOUT SEPTEMBER 22 OF 1995. DO YOU KNOW WHERE MR. ALVARADO WAS LIVING?

A YES.

Q WHERE?

A IN PICO RIVERA.

Q AND HOW FAR WAS MIKE'S HOUSE IN PICO RIVERA FROM YOUR HOUSE BEHIND THE SHOPPING CENTER IN SANTA FE SPRINGS?

[306] A I'M NOT SURE OF THAT.

Q WAS IT MORE THAN A MILE?

A NO.

Q HALF A MILE?

A YES.

Q AND THAT DAY DID MICHAEL ALVARADO, IF YOU KNOW, COME FROM HIS HOUSE TO GO TO YOUR HOUSE?

A YES.

Q DID HE WALK, IF YOU KNOW?

A NO.

Q HE DID NOT WALK?

A NO.

Q WAS THE DISTANCE BETWEEN YOUR HOUSE BY THE SHOPPING CENTER AND MR. ALVARADO'S HOUSE IN PICO RIVERA A DISTANCE THAT'S A LITTLE FURTHER THAN WALKING DISTANCE?

A YES.

Q YOU PREFER TO DRIVE THAT DISTANCE, CORRECT?

A YES.

MS. NAKAKI: NOTHING FURTHER.

THE COURT: WHY DON'T WE GO AHEAD AND TAKE A BREAK.

LADIES AND GENTLEMEN, WE'LL TAKE A 15-MINUTE BREAK, RECONVENE A LITTLE AFTER 11:00, 11:05.

THIS IS THE FIRST TIME WE WILL TEST THE ADMONITION THAT I'VE BEEN GIVING TO YOU NOT TO TALK ABOUT THIS CASE AMONGST YOURSELVES OR ANYBODY ELSE, AND DON'T MAKE UP YOUR MIND. KEEP AN OPEN MIND.

(AT 10:50 A.M. THE JURY WAS EXCUSED FOR [307] A RECESS UNTIL 11:05 A.M.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY.)

THE COURT: BACK ON THE RECORD. READY FOR THE JURY?

MR. GUTIERREZ: YOUR HONOR, APPARENTLY WE HAVE SOMEONE FROM THE PRESS HERE, AND I GUESS -- WHICH IS FINE. I HAVE NO OBJECTION TO

THE PRESS BEING HERE. THEY ARE ENTITLED TO BE HERE. I ANTICIPATE THEY'LL WRITE SOME KIND OF ARTICLE ABOUT THE CASE. I DON'T KNOW WHAT THE CONTENT OF THE ARTICLE IS, BUT I'M SURE IT'S ABOUT THIS CASE.

WHAT CONCERNED ME IS THE LAST ARTICLE WHERE APPARENTLY MR. SOTO MAY HAVE BEEN INVOLVED IN AN INCIDENT. I DON'T WANT THAT TO SPILL OVER TO MY CLIENT, AND MAYBE WE SHOULD ADMONISH THE JURY NOT TO READ ANY ARTICLES ABOUT THE CASE.

THE COURT: AT HE CONCLUSION OF THE SESSION I'LL ASK THEM NOT TO READ THE NEWSPAPERS. IN FACT, MAYBE I CAN BE MORE SPECIFIC, IF WE CAN, ABOUT A PARTICULAR NEWSPAPER. THERE'S NO WAY I AM GOING TO TRY TO EDIT WHAT IS WRITTEN IN THE PRESS BEFOREHAND.

MR. GUTIERREZ: PERHAPS JUST NEWSPAPERS IN GENERAL. RATHER THAN FOCUS ON A PARTICULAR NEWSPAPER.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

[308] THE COURT: BACK ON THE RECORD NOW.

JUROR 8: IT'S A LITTLE HARD TO HEAR HIM SOMETIMES. HIS WORDS GET LOST.

THE COURT: OKAY. MR. GUTIERREZ, PULL THE MICROPHONE UP BENEATH YOUR CLIENT THERE. MR. GUTIERREZ, GO AHEAD.

+CROSS-EXAMINATION

BY MR. GUTIERREZ:

Q GOOD MORNING, MR. RIVERA. MY NAME IS JOSEPH GUTIERREZ AND I'LL ASK YOU SOME QUESTIONS. I REPRESENT MICHAEL ALVARADO, THE YOUNG MAN AT THE END OF COUNSEL TABLE.

IF YOU DON'T UNDERSTAND A QUESTION, PLEASE LET ME KNOW AND I'LL REPEAT IT. OKAY?

A OKAY.

Q AND IF YOU NEED A BREAK OR ANYTHING, LET US KNOW AND WE'LL ACCOMMODATE YOU. OKAY?

A YES.

Q NOW, MANUEL -- MR. RIVERA YOU WERE ASKED SOME QUESTIONS ABOUT IMMUNITY. I'M NOT GOING TO GO INTO THE CONTENTS OF THE CONVERSATION YOU HAD WITH YOUR LAWYER. ISN'T IT TRUE YOU HAD CONVERSATIONS WITH YOUR LAWYER?

A YES.

Q AND FOLLOWING YOU CONVERSATIONS WITH YOUR LAWYER IMMUNITY WAS OBTAINED FOR YOU; IS THAT CORRECT?

A THAT IS CORRECT.

Q AND YOU UNDERSTAND THAT JUDICIAL IMMUNITY MEANS YOU CANNOT BE PROSECUTED; IS THAT CORRECT?

A YES.

[309] Q NOW, MR. RIVERA, YOU INDICATED DURING THE LATTER PORTIONS OF YOUR TESTIMONY HERE TODAY THAT THE -- TO THE JURY THAT THAT NIGHT YOU AND MIKE AND PAUL WENT TO HIDE THE GUN; IS THAT CORRECT?

A YES.

Q ISN'T IT TRUE THAT BEFORE TAKING THIS WITNESS STAND ON FEBRUARY 21ST OF THIS YEAR YOU WENT TO THE DISTRICT ATTORNEY OFFICE AND

HAD AN INTERVIEW WITH THE D.A. AND THE D.A. INVESTIGATOR?

A THAT IS CORRECT.

Q AND THAT D.A. INVESTIGATOR -- THE DISTRICT ATTORNEY WAS MS. NAKAKI, THE LADY HERE?

A YES.

Q AND THERE WAS D.A. INVESTIGATOR; IS THAT CORRECT?

A THAT IS CORRECT.

Q AND YOU TOLD THEM THAT BOTH SUSPECTS, MEANING PAUL AND MIKE, LEFT THE HOUSE TO HIDE THE GUN. YOU DID NOT GO WITH THEM. YOU DID NOT GO WITH THEM; IS THAT CORRECT?

A YES.

Q SO ON FEBRUARY 21ST OF 1997 IN THE D.A. OFFICE YOU WERE ASKED ABOUT HIDING THE GUN

AND YOU DECIDE THAT YOU WENT TO HIDE THE GUN; IS THAT CORRECT?

A YES.

Q AND THAT WAS A LIE, CORRECT?

A YES.

Q YOU LIED TO THE DISTRICT ATTORNEY, CORRECT, WHEN YOU SAID THAT?

[310] A YES.

Q AND YOU LIED TO THE DISTRICT ATTORNEY INVESTIGATOR, CORRECT?

A YES.

Q AND IN FACT, YOU WERE INTERVIEWED BY THE POLICE IN THIS CASE ON MORE THAN ONE OCCASION, CORRECT?

A THAT'S CORRECT.

Q AND YOU EVEN LIED TO THE POLICE AT TIMES, CORRECT?

A YES.

Q IN FACT, THEY CONFRONTED YOU WITH YOUR LIES AND SAID YOU LIED TO THEM, CORRECT?

A YES.

Q NOW, MR. RIVERA, ABOUT HOW MANY TIMES WERE YOU INTERVIEWED BY THE POLICE?

A I'M NOT SURE ON THAT.

Q THREE OR FOUR TIMES, FIVE TIMES?

A THREE OR FOUR TIMES.

Q AND HOW MANY TIMES DO YOU THINK YOU'VE COME TO THE COURTHOUSE, SAY, THIS COURTHOUSE IN NORWALK?

A THREE TIMES.

Q AND THIS BEING YOUR THIRD TIME OR YOU'VE BEEN HERE TREE TIMES PRIOR TO TODAY?

A THREE TIMES PRIOR.

Q THIS WOULD BE YOUR FOURTH VISIT?

A YES.

Q AND, SIR, DO YOU RECALL EVER GOING TO THE MUNICIPAL COURT WHEN THIS CASE WAS IN THE MUNICIPAL COURT?

[311] A YES.

Q ABOUT HOW MANY TIMES DID YOU GO TO THAT COURTHOUSE?

MS. NAKAKI: OBJECTION; RELEVANCE, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: FOUR OR FIVE.

Q BY MR. GUTIERREZ: FOUR OR FIVE TIMES. YOU -- THIS IS THE FIRST TIME YOU'VE EVER GIVEN SWORN TESTIMONY?

A YES.

Q FIRST TIME YOU'VE EVER TESTIFIED?

A YES.

Q NOW, LAST YEAR AT THE COURTHOUSE, THE MUNICIPAL COURT HOUSE IN THE COURTROOM

THERE AT THE BACK OF THE COURTROOM, DID I INTRODUCE MYSELF TO YOU?

A YES, YOU DID.

Q WAS I POLITE AND COURTEOUS?

A YES.

Q DID WE HAVE A CONVERSATION?

A YES, WE DID.

Q DID YOU TRY TO BE TRUTHFUL TO ME?

A YES.

Q TRY TO TELL ME -- GIVE ME THE BENEFIT OF YOUR BEST RECOLLECTION OF THE EVENTS OF THAT DAY?

A YES.

Q AND YOU ALSO SPOKE TO INVESTIGATOR FOR THE DEFENSE FOR MICHAEL ALVARADO, DAVE CORREA?

A YES, I DID.

Q WHEN YOU SPOKE TO DAVE CORREA, YOU SPOKE TO [312] HIM IN PERSON?

A YES.

Q HAD A LENGTHY CONVERSATION WITH HIM?

A YES.

Q DID YOU TRY TO BE HONEST AND TRUTHFUL WITH HIM?

A YES, I DID.

Q OKAY. ISN'T IT TRUE THAT YOU TOLD ME THAT YOU CAN'T REALLY SAY FOR SURE THAT MIKE SAID "LET'S GO"?

MS. NAKAKI: YOUR HONOR, I'LL OBJECT UNLESS THERE'S A BASIS.

THE COURT: COUNSEL, APPROACH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR.)

THE COURT: OBJECTION.

MS. NAKAKI: WELL, YOUR HONOR, UNLESS THERE WAS SOMEBODY ELSE PRESENT THAT CAN BE CALLED AS A WITNESS THAT MR. GUTIERREZ INTENDS TO PERMIT HIMSELF TO BE CALLED AS A WITNESS IF HIS ANSWER IS SOMEWHAT DIFFERENT THAT WHAT HE EXPECTS, I SEE A PROBLEM.

THE COURT: WAS THIS CONVERSATION AT THE SAME TIME MR. CORREA WAS PRESENT?

MR. GUTIERREZ: NO. THIS WAS A CONVERSATION IN THE REAR OF THE COURTROOM, BUT IT'S MY UNDERSTANDING THAT HE'S GOING TO ADMIT THAT HE TOLD ME THAT HE SAID THAT IN THE PRESENCE OF HIS LAWYER, SO I CAN SAY IN GOOD FAITH I KNOW [313] WHAT THE RESPONSE IS.

I ALSO KNOW HE WAS ASKED THE SAME QUESTION BY MR. CORREA, AND MR. CORREA IS

AVAILABLE AS A WITNESS AND HE'S ON MY WITNESS LIST.

THE COURT: BASED ON THAT REPRESENTATION, GO AHEAD.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

BY MR. GUTIERREZ:

Q SIR, MR. MANUEL RIVERA, SIR, YOU AND I HAD A CONVERSATION LAST YEAR IN THE COURTROOM IN WHITTIER; IS THAT CORRECT?

A YES.

Q AND YOU INDICATED YOU'D TRY TO BE AS HONEST AS YOU COULD WITH ME?

A YES.

Q ISN'T IT A FACT THAT YOU TOLD ME THAT YOU REALLY COULDN'T SAY FOR SURE THAT YOU EVER HEARD MIKE SAY ANYTHING OR SAYING TO THE EFFECT "LET'S DO IT"?

A THAT IS CORRECT.

Q WAS THAT THE TRUTH?

A YES.

Q SO YOU CAN'T SAY FOR SURE THAT MIKE DID SAY THAT?

A CORRECT.

Q AND YOU ALSO SPOKE TO MY INVESTIGATOR, DAVE CORREA?

[314] A YES.

Q AND WHEN YOU SPOKE TO MR. CORREA, IT WAS ABOUT A TWO-HOUR INTERVIEW?

A YES.

Q AND DID YOU ALSO INDICATE TO HIM THAT YOU REALLY COULD NOT SAY FOR SURE THAT MIKE EVER SAID "LET'S DO IT"?

A THAT'S CORRECT.

Q WAS THAT THE TRUTH?

A YES.

Q I NOTICE THIS MORNING A COUPLE TIMES YOU HAD TO REVIEW PORTIONS OF YOUR TRANSCRIPT. DO YOU REMEMBER THE D.A. SHOWING IT TO YOU?

A YES.

Q DO YOU THINK THAT YOUR MEMORY HAS FADED A LITTLE BIT OVER TIME?

A YES.

Q THINGS MIGHT HAVE BEEN A LITTLE CLEARER MONTHS AGO THAN THEY ARE TODAY?

A YES.

Q NOW, AT -- WHEN WAS THE FIRST TIME THAT YOU EVER TOLD THE DISTRICT ATTORNEY THAT PAUL SOTO SAID "I'LL SPLIT IT"?

A SORRY.

Q THIS MORNING YOU SAID SOMETHING TO THE EFFECT THAT PAUL SOTO SAID "LET'S JACK, " SOMETHING TO THE EFFECT "AND I'LL SPLIT THE MONEY." DO YOU REMEMBER THAT?

A YES.

[315] Q YOU NEVER SAID THAT BEFORE IN YOUR FIRST INTERVIEW WITH THE POLICE; YOU NEVER TOLD THEM THAT, CORRECT, "LET'S SPLIT IT"?

A YES.

Q THE VERY FIRST TIME THAT YOU'VE EVER HEARD THAT STATEMENT WAS, I GUESS, AFTER 1997, CORRECT?

A YEAH.

Q AND THESE CONVERSATIONS THAT OCCURRED BETWEEN MR. SOTO, DESMOND, VALERIE AND WHOEVER ELSE WAS THERE, WAS THAT BY THE PLANTER?

A YES.

Q AND WHICH PLANTER WAS IT?

A NEAREST TO THE PHONE.

Q THE PLANTER NEAREST TO THE PHONE?

A YES.

Q IS IT THE PLANTER SORT OF BETWEEN THE DONUT SHOP AND THE PHONES?

A THAT IS CORRECT.

Q WOULD IT BE THE PLANTER THAT'S ON THE SIDEWALK AREA?

A YES.

Q SO THAT WOULD BE SORT OF THE PLANTER THAT SEPARATES JACK'S MARKET AND THE DONUT SHOP?

A YES.

Q NOW, WHEN THIS CONVERSATION OCCURRED ABOUT "LET'S JACK", YOU WERE ON THE PHONE TALKING, CORRECT?

A YES.

Q WHO WERE YOU TALKING TO?

[316] A MIKE'S COUSIN.

Q SO -- IN FACT, YOU MADE SEVERAL PHONE CALLS THAT NIGHT?

A YES.

Q TALKED TO MORE THAT ONE PERSON?

A YES.

Q WHILE WERE YOU TALKING ON THE PHONE, WAS ANYBODY TALKING ON ANY OTHER PHONES?

A YES.

Q AND SO WHILE YOU WERE TALKING ON THE PHONE, PEOPLE -- SOMEONE MAY HAVE BEEN

TALKING ON ANOTHER PHONE NEXT TO YOU, CORRECT?

A CORRECT.

Q AND THE CONVERSATION ABOUT "LET'S JACK" WAS SOMEWHERE BY THE PLANTER, CORRECT?

A CORRECT.

Q AND YOU REALLY CAN'T SAY FOR SURE MIKE EVER REALLY SAYS "LET'S DO IT," CORRECT?

A CORRECT.

A CORRECT.

MR. GUTIERREZ: YOUR HONOR, MAY I APPROACH?

THE COURT: YES, YOU MAY.

MR. GUTIERREZ: PREVIOUSLY MARKED DEFENSE C, I'D LIKE TO SHOW THIS TO THE WITNESS.

(WHEREUPON, A PHOTOGRAPH OF PHONES, DEFENSE EXHIBIT C, WAS MARKED FOR IDENTIFICATION.)

[317] Q BY MR. GUTIERREZ: SIR, DIRECTING YOUR ATTENTION TO WHAT HAS BEEN MARKED DEFENSE EXHIBIT C, DOES THIS LOOK LIKE THE PHONES?

A YES.

Q AND THE DONUT SHOP WOULD BE OFF TO THE RIGHT OF THE PHOTOGRAPH; IS THAT CORRECT?

A YES.

Q IF YOU WERE ON THE PHONE, YOU WOULD BE UNABLE TO LOOK INTO THE DONUT SHOP, THAT WOULD BE SOMEWHERE TO THE RIGHT OF THE PHOTOGRAPH, CORRECT?

A CORRECT.

Q AND THE PHONES ARE SORT OF IN AN ALCOVE, A RECESSED AREA. FOR EXAMPLE, THE WALL -- LET'S ASSUME THIS BILLBOARD OR THIS CORKBOARD WERE THE WALL THAT'S DEPICTED IN DEFENSE EXHIBIT C, AND THE PHONES WOULD BE TO THE LEFT OF THE CORKBOARD, THEY WOULD SORT BE INSIDE IN A RECESSED AREA, CORRECT?

A CORRECT.

Q THE PHONES ARE NOT PARALLEL WITH THE WALL THAT RUNS ALONG JACK'S MARKET, TRUE?

A TRUE.

Q NOW, IN YOUR INITIAL INTERVIEW WITH THE POLICE, YOU ONLY ATTRIBUTE THE WORDS "LET'S JACK" TO MR. SOTO ON ONE OCCASION, CORRECT?

A YES.

Q YOU NEVER SAID THAT HE SAID IT MORE THAN ONCE, TRUE?

A TRUE.

[318] Q AND WHEN YOU HEARD IT THAT ONE TIME, YOU BELIEVE MIKE WAS WALKING OUT OF THE DONUT STORE, CORRECT?

A CORRECT.

Q AND MIKE WAS TALKING AS IT WAS SAID, CORRECT?

A YES.

Q AND YOU WERE ON THE PHONES TALKING?

A YES.

Q IN FACT, IT WASN'T UNTIL AFTER PEOPLE WENT TO THE TRUCK THAT YOU ACTUALLY GOT OFF THE PHONE; ISN'T THAT TRUE?

A THAT IS TRUE.

Q AND YOU WERE WATCHING FROM THE PAY PHONES?

A YES.

Q AND THOSE ARE THOSE PHONES ON DEFENSE C?

A YES.

Q SIR, I WOULD LIKE TO DIRECT YOUR ATTENTION TO WHAT HAS BEEN PREVIOUSLY MARKED DEFENSE D.

MR. GUTIERREZ: MAY I APPROACH, YOUR HONOR?

THE COURT: YES, YOU MAY

(WHEREUPON, A PHOTOGRAPH OF THE DONUT STORE, DEFENSE EXHIBIT D, WAS MARKED FOR IDENTIFICATION.)

Q BY MR. GUTIERREZ: LOOKING AT DEFENSE EXHIBIT D. DOES THIS APPEAR TO BE THE DONUT STORE YOU WERE REFERRING TO?

A YES.

[319] Q AND LOOKING TO THE LEFT OF DEFENSE EXHIBIT D, DOES THAT APPEAR TO BE THE PHONES THAT ARE IN THE ALCOVE?

A YES.

Q YOU INDICATED IT WAS THE PLANTER NEXT TO THE SIDEWALK BETWEEN THE DONUT STORE AND JACK'S. WOULD THIS BE THE PLANTER, SIR?

A YES.

Q SO SOMEWHERE AROUND THE DONUT SHOP THERE WAS A CONVERSATION OCCURRING; IS THAT CORRECT?

A THAT'S CORRECT.

Q THAT WAS A CONVERSATION YOU REFERRED TO DURING DIRECT AND RIGHT NOW, CORRECT?

A YES.

Q AND THAT WOULD BE SOMEWHERE AROUND THIS PLANTER?

A YES.

Q IN FRONT OF THE PLANTER OR SITTING ON THE PLANTER?

A YES.

Q SOMEWHERE IN THAT GENERAL AREA?

A YES.

MR. GUTIERREZ: YOUR HONOR, MAY I HAVE THE WITNESS --

Q WHY DON'T YOU JUST DRAW A CIRCLE AROUND APPROXIMATE AREA WHERE THAT CONVERSATION WAS OCCURRING "LET'S JACK."

A (WITNESS COMPLIES).

Q AND BASED ON YOUR ORIGINAL INTERVIEW, YOU ONLY [320] HEARD THAT STATEMENT ONCE, CORRECT?

A CORRECT.

Q AND AT THAT TIME MIKE WAS WALKING, CORRECT --

A YES.

Q -- FROM THE DONUT STORE?

A YES.

Q AND YOU ARE REALLY NOT SURE MIKE SAID ANYTHING, ARE YOU?

A NO, I'M NOT.

Q AND, SIR, ISN'T IT A FACT THAT IF SOMEONE IS AT THE PHONES, AS DEPICTED IN DEFENSE C, THAT PERSON WHO WAS ON ANY ONE OF THESE THREE PHONES WOULD BE UNABLE TO ACTUALLY SEE INSIDE THE DONUT STORE, CORRECT?

A CORRECT.

Q AND, SIR, ISN'T IT A FACT THAT IF SOMEONE WERE ON THE PHONE OR STANDING BY THE PHONE IN DEFENSE EXHIBIT C, THAT PERSON -- IT WOULD BE PHYSICALLY IMPOSSIBLE FOR THAT PERSON TO ACTUALLY SEE THE PLANTER AREA, CORRECT?

A CORRECT.

Q AND NOT ONLY IS THE PHONE IN AN ALCOVE, THE WALL THAT RUNS ACROSS COMES UP TO A PILLAR AND THAT PILLAR EXTENDS A LITTLE BIT?

A YES.

Q YOU WOULD HAVE TO BE TO THE RIGHT OF THE PILLAR TO BE ABLE TO SEE IT, THE RIGHT OF THE PILLAR IN DEFENSE C, TO ACTUALLY SEE INSIDE THE DONUT OR INSIDE THE DONUT OR --

A CORRECT.

[321] Q YOU WOULD HAVE TO BE TO THE RIGHT OF THE PILLAR TO SEE THIS AREA OF THE PLANTER THAT HAS BEEN MARKED IN DEFENSE D, THE AREA THAT YOU CIRCLED WHERE THE ALLEGED CONVERSATION OCCURRED, CORRECT?

A YES.

Q NOW, MY CLIENT, MR. ALVARADO, DID YOU EVER SEE HIM PRIOR TO HEARING THIS SHOT WITH A GUN?

A NO.

Q HAD YOU EVER SEEN A GUN THAT NIGHT PRIOR TO HEARING A SHOT?

A NO.

Q AT ANY TIME WHILE YOU WERE AT YOUR HOUSE WITH PEOPLE VISITING THERE, WAS THERE EVER ANY DISCUSSION ABOUT SHOOTING SOMEONE OR ROBBING SOMEONE?

A NO.

Q DID YOU EVER HEAR MIKE AT YOUR HOUSE TALK ABOUT STEALING SOMEBODY'S CAR OR TAKING SOMEBODY'S MONEY?

A NO.

Q ISN'T IT TRUE, SIR, THAT THE NIGHT OF THAT PARTY MIKE WAS GOING TO SPEND THE NIGHT AT YOUR HOUSE?

A YES.

Q AND ISN'T IT TRUE ALSO THAT MIKE ONLY LIVES A FEW BLOCKS FROM THIS STRIP MALL, WALKING DISTANCE; IS THAT CORRECT?

A MORE THAT A FEW BLOCKS.

Q WELL, IT'S HALF A MILE, ABOUT A HALF A MILE?

A RIGHT.

Q THE STRIP MALL ON TELEGRAPH ROAD?

[322] A YES.

Q AND THAT IS DIRECTLY EAST OF THE 605 FREEWAY, CORRECT?

A CORRECT.

Q AND MIKE LIVES ALMOST IMMEDIATELY WEST OF THE 605 FREEWAY, CORRECT?

A CORRECT.

Q HE HAS WALKED TO YOUR HOUSE BEFORE, HASN'T HE?

A YES.

Q SO HIS HOUSE IS WALKING DISTANCE TO THE MALL?

A YES.

Q AND HAVING KNOWN MIKE, DID YOU -- MIKE WOULD FREQUENT THAT MALL, HE WOULD GO THERE QUITE A BIT?

A YES.

Q THE TOWN CENTER, IS THAT ABOUT A BLOCK FROM THE MALL, BLOCK AND-A-HALF?

A BLOCK AND-A-HALF.

Q DO YOU KNOW IF MIKE EVER DID WORK AT THE TOWN CENTER?

A IF HE WORKED?

Q YES.

A YES.

Q AND BY THE WAY, DO YOU KNOW IF MIKE HAD MONEY THAT NIGHT?

A FROM MY KNOWLEDGE,YES.

Q HE HAD KNOWN?

A YES.

Q HE DIDN'T INDICATE HE WAS BROKE OR NEEDED [323] MONEY, DID HE?

A NO.

Q IN FACT, HE HAD MONEY?

A YES.

Q YOU INDICATED, SIR, THAT THERE WAS -- WAS IT LIKE A PARTY AT YOUR HOUSE OR SORT OF A GET-TOGETHER, OR WHAT?

A A GET-TOGETHER.

Q PEOPLE WOULD COME OVER AND BASICALLY SOCIALIZE, CORRECT?

A CORRECT.

Q YOUNG MEN AND YOUNG WOMEN?

A YES.

Q HOW LONG HAD YOU KNOWN MICHAEL ALVARADO PRIOR TO THIS INCIDENT, THE INCIDENT I'M REFERRING TO IS SEPTEMBER 23 OF 1995?

A A LITTLE OVER TWO YEARS.

Q IN THOSE TWO YEARS THAT YOU KNEW MICHAEL ALVARADO PRIOR TO SEPTEMBER 23 OF 1995, HAD YOU EVER SEEN HIM IN THE PRESENCE OF MR. SOTO?

A NO.

Q BASED ON YOUR KNOWLEDGE OF MICHAEL AND THE TIMES THAT YOU HAD SEEN HIM DURING THE TWO-YEAR PERIOD, DID YOU HAVE ANY REASON TO BELIEVE THAT PRIOR TO SEPTEMBER 23, 1995 THAT MY CLIENT KNEW PAUL SOTO?

A NO.

Q DID YOU KNOW PAUL SOTO PRIOR TO SEPTEMBER 23, 1995?

[324] A NO, I DID NOT.

Q WHEN YOU SPOKE TO THE POLICE THE SECOND TIME, THEY TOLD YOU THAT YOU HAD OMITTED TELLING THEM THE NAMES OF TWO OTHER INDIVIDUALS THAT HAD BEEN AT THE PARTY EARLIER; IS THAT CORRECT?

A YES.

Q AND YOU TOLD THEM THAT BASICALLY YOU JUST DIDN'T WANT TO GET THEM INVOLVED; IS THAT CORRECT?

A YES.

Q THEY SEEMED PRETTY UPSET, DIDN'T THEY?

A YES.

Q AFTER YOU WERE INTERVIEWED BY THE POLICE THE FIRST TIME, DID YOU EVER SPEAK TO A SONJA RIOS?

A SONJA RIOS, YES.

Q AND DID YOU EVER TELL HER YOU DIDN'T KNOW WHAT WAS GOING TO HAPPEN AFTER YOU

SPOKE TO THE POLICE, THAT YOU DIDN'T KNOW IF YOU WERE GOING TO BE ARRESTED AND YOU DIDN'T KNOW WHAT WAS GOING TO HAPPEN?

MS. NAKAKI: YOUR HONOR, OBJECTION UNLESS THERE IS FOUNDATION.

MR. GUTIERREZ: I JUST ASKED IF HE EVER SAID THAT.

THE COURT: OVERRULED.

YOU MAY ANSWER.

Q BY MR. GUTIERREZ: DID YOU EVER SAY THAT TO HER?

A YES.

Q SO YOU WERE CONCERNED THAT YOU MIGHT BE ARRESTED OR CHARGED WITH SOME KIND OF OFFENSE, CORRECT?

[325] A CORRECT.

Q NOW, YOUR HOUSE, SIR, HAD A BACK GATE?

A YES.

Q AND THAT GATE LEADS INTO LIKE A SMALL STREET THAT GOES INTO THE MALL, CORRECT?

A YES.

Q ABOUT HOW FAR IS YOUR HOUSE FROM THE MALL?

A FROM THAT BACK GATE, LET'S SAY FROM THAT BACK GATE TO THE DRIVEWAY THAT ENTERS THE MALL AT THE REAR OF YOUR HOUSE. SAY FROM ME TO YOU OR --

A FURTHER.

Q A LITTLE FURTHER. ABOUT THIS FAR (INDICATING)?

A A LOT FURTHER.

Q MAYBE THE WALL?

A EVEN FURTHER.

Q I'M TALKING ABOUT THE BACK GATE, THE GATE THAT LEADS INTO THE ALLEY INTO THE STREET.

A UH-HUH.

Q I'M REFERRING TO YOUR HOUSE DOOR, THE PROPERTY LINE, THE GATE THAT LEADS INTO THE ALLEY THAT LEADS INTO THE STREET THAT GOES INTO THE MALL.

A FROM MYSELF TO THE WALL.

Q FROM YOURSELF TO THE WALL.

THE COURT: APPROXIMATELY 34 FEET.

Q BY MR. GUTIERREZ: AND IT WAS COMMON AROUND THE TIME OF SEPTEMBER 23 FOR YOU TO GO TO THE PHONES AND USE THOSE PHONES IN FRONT OF JACK'S MARKET, CORRECT?

[326] A YES.

Q AND IT WAS ALSO COMMON FOR MIKE TO GO TO THE PHONE AND USE THOSE PHONES IN FRONT OF JACK'S MARKET WHENEVER HE WAS AT YOUR HOUSE?

A YES.

Q THERE WAS NOTHING OUT OF THE ORDINARY WHEN EVERYBODY AROUND MIDNIGHT WENT OUT TO THE MALL AREA AND USED THE PHONES, CORRECT?

A CORRECT.

Q AND WHEN YOU ENTERED THE MALL, THERE IS EVEN A POLICE STATION AT THE MALL, ISN'T THERE, A SUBSTATION?

A YES.

Q AND THAT SUBSTATION IS RATHER CLOSE TO THE ENTRANCE OF THE MALL WHERE YOU LIVE, BY THE SITE WHERE YOU LIVE, CORRECT?

A CORRECT.

Q AND THE NIGHT THAT THIS INCIDENT OCCURRED, THE NIGHT THAT THE SHOOTING OCCURRED, THERE WERE POLICE AT THAT MALL, CORRECT?

A YES.

Q AND YOU KNEW THERE WERE POLICE AT THAT MALL, CORRECT?

A YES.

Q AND MIKE, YOU HAD SEEN HIM AT THAT MALL MANY TIMES PRIOR TO SEPTEMBER 23, CORRECT?

A CORRECT.

Q HE HUNG OUT THERE QUITE A BIT, CORRECT?

A YES.

[327] Q DID YOU EVER SEE MIKE, MICHAEL ALVARADO, MR. ALVARADO ON THE DRIVER'S SIDE OF THAT WHITE TRUCK?

A NO.

Q DID YOU EVER SEE MICHAEL ALVARADO OR OBSERVE WHAT APPEARED TO BE A CONVERSATION BETWEEN MICHAEL ALVARADO AND THE DRIVER OF THAT TRUCK?

A NO.

Q DID YOU EVER OBSERVE MICHAEL ALVARADO TO TOUCH THE MAN AT ALL?

A NO.

Q DID YOU EVER SEE MICHAEL ALVARADO ENTER THE MAN'S TRUCK?

A NO.

Q DID YOU EVER SEE MICHAEL ALVARADO MOVE THINGS AROUND THE BACK OF THE TRUCK OR THE BED OF THE TRUCK?

A NO.

Q DID YOU EVER SEE MICHAEL ALVARADO IN ANY WAY TOUCH THAT TRUCK?

A NO.

Q IN FACT, HE WAS BY THE REAR PASSENGER TIRE, CORRECT?

A CORRECT.

Q HE WAS AWAY FROM THE REAR PASSENGER TIRE SEVERAL FEET, CORRECT?

A YES.

Q AND YOU NEVER EVER OBSERVED HIM GO OVER TO THE DRIVER'S SIDE OF THE VEHICLE, CORRECT?

A THAT'S CORRECT.

[328] Q AND THIS SHOOTING THAT OCCURRED, IT ALL HAPPENED VERY QUICKLY?

A YES.

Q WITHIN 30 SECONDS OF YOU SEEING PEOPLE BEGINNING TO WALK OVER THERE?

A YES.

Q IN FACT, YOU RECALL THAT, IS THAT CORRECT, WITHIN 30 SECONDS?

A YES,

Q YOU WERE UNABLE TO HEAR ANY CONVERSATION AT THE DUMPSTER WHILE YOU WERE STANDING BY THE PHONES; IS THAT CORRECT?

A THAT IS CORRECT.

Q AND INITIALLY YOU TOLD THE POLICE THAT YOU WERE ABLE TO HEAR IT, BUT THEN YOU SAID "NO -- WELL, YES, HE TOLD ME WHAT HE SAID"; IS THAT CORRECT?

A THAT'S CORRECT.

Q IS THERE ANY REASON WHY INITIALLY YOU TOLD THE POLICE YOU WERE ABLE TO HEAR A CONVERSATION AT THE DUMPSTER WHEN YOU WERE STANDING BY THE PHONES?

A NO.

Q KIND OF CONFUSED?

A YES.

Q YOU DIDN'T KNOW IF YOU HAD HEARD IT FROM SOMEONE OR YOU ACTUALLY HEARD IT YOURSELF AT THAT TIME, CORRECT?

A CORRECT.

Q AND LET ME REPHRASE THAT. I MEAN, CONFUSED, [329] YOU ACTUALLY HEARD IT THAT

NIGHT OR SOME OTHER DAY LATER SOMEBODY MENTIONED IT TO YOU, CORRECT?

A YES.

Q AND THE REASON YOUR PERCEPTION WAS A LITTLE CONFUSED IT WOULD BE FAIR TO SAY THAT NIGHT YOU'D BE PARTYING A LITTLE BIT, CORRECT?

A YES.

Q YOU WERE TELLING US ABOUT DRINKING TWO 40-OUNCERS?

A YES.

Q AND SUBSEQUENTLY DRINKING MORE BEER?

A YES.

Q AND EVEN DRINKING WINE?

A YES.

Q AND SO OVER A FEW HOURS YOU WERE PRETTY MUCH DRINKING CONTINUOUSLY?

A THAT'S CORRECT.

Q WHAT ABOUT MARIJUANA? AND IT'S OKAY, YOU HAVE IMMUNITY. DID YOU SMOKE ANY MARIJUANA THAT NIGHT?

A YES.

Q HOW MUCH MARIJUANA DID YOU SMOKE?

A A JOINT.

Q COULD IT HAVE BEEN MORE THAN A JOINT OVER THE COURSE OF THAT FEW HOURS?

A NO. THAT WAS IT.

Q BUT MAYBE A FULL JOINT?

A YES.

Q OKAY. BY A "FULL JOINT," I MEAN ONE FOR [330] YOURSELF AS OPPOSED TO PASSING IT AROUND?

A PASSING IT AROUND.

Q THAT MARIJUANA, DID YOU SMOKE IT THROUGHOUT THE EVENING BEEORE THE SHOOTING?

A YES, IT WAS BEFORE.

Q BEFORE?

A YES.

Q HOW LONG BEFORE THE SHOOTING WAS IT THAT YOU WERE SMOKING MARIJUANA?

A MAYBE TWO HOURS BEFORE.

Q TWO HOURS BEFORE. COULD IT HAVE BEEN CLOSER IN TIME?

A NO.

Q DID YOU EVER LOOK AT THE WATCH AND CHECK YOUR WATCH WHEN YOU WERE SMOKING?

A NO.

Q YOU JUST PRETTY MUCH WOULD SMOKE MARIJUANA AND DRINK AND PARTY, THAT'S WHAT EVERYBODY WAS DOING, HAVING A GOOD TIME, CORRECT?

A CORRECT.

Q IT WOULD BE FAIR TO SAY THAT DRINKING TWO 40-OUNCER BEERS, DRINKING WINE, DRINKING SOME ADDITIONAL BEER AND SMOKING MARIJUANA AFFECTED YOUR MIND A LITTLE BIT?

A YES.

Q MAYBE A LOT?

A YES.

Q PRETTY STONED?

A NO.

[331] Q SOMEWHAT?

A YES.

Q AND THAT'S WHY WHEN YOU INITIALLY TOLD THE POLICE YOU HEARD A CONVERSATION AT THE DUMPSTER AND LATER ON SAYING, WELL, SOMEBODY TOLD YOU ABOUT A CONVERSATION AT THE DUMPSTER IS BECAUSE YOUR PERCEPTION WAS A LITTLE OFF THAT NIGHT?

A YES.

Q WHEN MR. SOTO LATER THAT EVENING SAID "DON'T SAY ANYTHING" OR "DON'T SAY SHIT," THAT STATEMENT WAS ALSO DIRECTED AT MIKE, CORRECT?

A CORRECT.

Q SO IT WAS DIRECTED AT YOU AND MIKE?

A YES.

Q AND MIKE WAS PRETTY UPSET ABOUT WHAT HAPPENED, WASN'T HE?

A YES.

Q HE WAS ANGRY, WASN'T HE?

A YES.

Q AND YOU WERE UPSET?

A YES.

Q AND YOU WERE ANGRY?

A YES.

Q AND YOU WERE FRIGHTENED?

A YES.

Q AND MIKE WAS FRIGHTENED?

A YES.

Q AND THE DUMPSTER WHERE THIS INCIDENT OCCURRED, [332] SIR, IS --

MR. GUTIERREZ: YOUR HONOR, MAY I APPROACH WITH DEFENSE EXHIBIT A, WHAT HAS PREVIOUSLY BEEN MARKED AS DEFENSE EXHIBIT A.

(WHEREUPON, A PHOTOTOGRAPH OF DUMPSTER, DEFENSE EXHIBIT A, WAS MARKED FOR IDENTIFICATION.)

Q BY MR. GUTIERREZ: WOULD BE THIS DUMPSTER HERE, CORRECT, WHERE I MARKED DEFENSE A, THIS WOULD BE THE DUMPSTER, CORRECT?

A CORRECT.

Q AND THE DONUT STORE WOULD BE THAT AREA AT THE BACK OF THE PICTURE TO THE LEFT WHERE IT SAYS DONUTS AND MORE DONUTS AND MORE?

A YES.

Q AND BETWEEN WHERE IT SAYS DONUTS ARE CARS THAT CAN PARK FACING THE DONUT SHOP, CORRECT?

A YES.

Q AND CARS THAT CAN PARK FACING THE DUMPSTER?

A YES.

Q AND THE TRUCK WAS PARKED -- IT WAS PARKED WITH THE DRIVER'S SIDE FACING THE DUMPSTER?

A YES.

Q SO THE HEADLIGHTS WOULD BE GOING TO THE RIGHT OF THE CAR TO THE RIGHT OF THE PHOTOGRAPH?

A YES.

[333] Q AND THE REAR TAILLIGHTS WOULD BE FACING TOWARDS THE DONUT STORE?

A CORRECT.

Q AND MIKE WOULD HAVE BEEN A FEW FEET FROM THE REAR PASSENGER TIRE, SOMEWHERE OFF THE PICTURE, CORRECT?

A YES.

Q AND THE DECEDENT IN THIS CASE, THE VICTIM, WOULD HAVE BEEN CLOSER TO THE DUMPSTER; THAT'S CORRECT?

A THAT'S CORRECT.

Q NOW, MS. NAKAKI ASKED YOU IF BACK IN SEPTEMBER YOU AND MIKE WERE FRIENDS. YOU

HAVE NEVER SEEN HIM IN WHERE HE'S IN CUSTODY, CORRECT?

A THAT IS CORRECT.

Q YOU HADN'T HAD ANY PHONE CONVERSATIONS WITH HIM IN THE LAST YEAR-AND-A-HALF, HAVE YOU?

A NO.

Q YOU HAVEN'T WRITTEN HIM ANY LETTERS OR HE HASN'T WRITTEN YOU ANY LETTERS, CORRECT?

A CORRECT.

Q WHAT ARE YOU TELLING THIS JURY, YOU CAN'T SAY FOR SURE, YOU CAN'T SAY FOR POSITIVE MIKE REALLY SAID SOMETHING, THAT'S THE TRUTH, ISN'T IT?

A YES.

Q THAT'S ALWAYS BEEN THE TRUTH?

A YES.

MR. GUTIERREZ: NO FURTHER QUESTIONS.

THE COURT: MR. BERNSTEIN, YOU WANT TO START?

MR. BERNSTEIN: SURE, YOUR HONOR.

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LODGED
CLERK, U.S. DISTRICT COURT
JUN 12 2000
CENTRAL DISTRICT
OF CALIFORNIA

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HONORABLE PHILIP H. HICKOK, JUDGE PRESIDING
REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DAN E. LUNGREN
STATE ATTORNEY GENERAL
300 SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CALIFORNIA 90013

FOR THE DEFENDANT-APPELLANT: IN PROPRIA PERSONA

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CHRISTIE SCHIZAS, CSR 8790

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT
NO. SO-E HON. PHILIP H. HICKOK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

REPORTER'S TRANSCRIPT ON APPEAL
MARCH 10, 11, 1997

APPEARANCES:

FOR THE PEOPLE: GILBERT GARCETTI
DISTRICT ATTORNEY
BY: CAROLINE NAKAKI, DEPUTY
12720 NORWALK BOULEVARD
NORWALK, CALIFORNIA 90650

FOR THE DEFENDANT: PAUL R. SOTO
BARRY O. BERNSTEIN
ATTORNEY AT LAW
1901 AVENUE OF THE STARS
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CENTURY CITY, CALIFORNIA 90067

CHRISTIE SCHIZAS, CSR #8790

[484]

* * * *

MS. NAKAKI: THE PEOPLE CALL DETECTIVE COMSTOCK.

THE CLERK: DO YOU SOLEMNLY SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

THE WITNESS: I DO.

CHERYL COMSTOCK,

PRODUCED AS A WITNESS BY AND ON BEHALF OF THE PEOPLE, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE CLERK: PLEASE TAKE A SEAT IN THE WITNESS STAND. STATE YOUR NAME AND SPELL IT FOR THE RECORD.

THE WITNESS: CHERYL COMSTOCK, C-H-E-R-Y-L, C-O-M-S-T-O-C-K.

[485]

+DIRECT EXAMINATION

BY MS. NAKAKI:

Q WHAT IS YOUR OCCUPATION:

A DEPUTY SHERIFF FOR THE COUNTY OF LOS ANGELES. I'M CURRENTLY ASSIGNED TO THE HOMICIDE BUREAU.

Q AND BEGINNING ON SEPTEMBER 23, 1995, WERE YOU INVOLVED IN THE INVESTIGATION OF THE DEATH OF FRANCISCO CASTANEDA?

A YES, I WAS.

Q AND AS PART OF YOUR DUTIES, DID YOU ACTUALLY GO OUT TO THE LOCATION WHERE THIS OCCURED?

A YES, I DID.

MS. NAKAKI: I'M APPROACHING THE WITNESS WITH PEOPLE'S 7, WHICH WAS A PHOTOGRAPH OF WHAT APPEARS TO BE THE TOP PORTION OF A SHIRT.

Q DO YOU RECOGNIZE THAT, DETECTIVE COMSTOCK?

A YES, I DO.

Q HOW DO YOU RECOGNIZE IT?

A IT WAS OBTAINED AT THE SCENE. I SAW IT AT THE LOCATION.

MS. NAKAKI: I'M SHOWING THE WITNESS PEOPLE'S 4, WHICH IS THE PHOTOGRAPH OF A WHITE TRUCK NEXT TO A TRASH BIN.

Q DO YOU SEE CLOTHING IN THE PHOTOGRAPH THAT HAS BEEN MARKED PEOPLE'S 4?

A YES.

Q AND THAT IS -- APPEARS TO BE TO THE LEFT SIDE [486] OR LEFT FRONT SIDE OF THE TRUCK; IS THAT CORRECT?

A YES.

Q AND THE PHOTOGRAPH, PEOPLE'S 7, WHICH APPEARS TO BE THE TOP PORTION OF A SHIRT, IS THAT THE SAME CLOTHING THAT YOU PHOTOGRAPHED SHOWN IN PEOPLE'S 4 -- IN PEOPLE'S 7? WHAT'S SHOWING IN PEOPLE'S 4?

A YES.

Q ALSO, AS PART OF YOUR INVESTIGATION RECORDING THE DEATH OF MR. CASTANEDA, DID YOU INTERVIEW A MICHAEL ALVARADO?

A YES, I DID.

Q WAS THAT ON OCTOBER 24, 1995?

A YES.

Q THIS WAS 12:30 IN THE AFTERNOON AT THE PICO RIVERA STATION; IS THAT CORRECT?

A YES.

Q AND DURING THAT INTERVIEW, MR. ALVARADO DID IN FACT ANSWER SOME OF YOUR QUESTIONS; IS THAT RIGHT?

A YES.

MS. NAKAKI: YOUR HONOR, I HAVE AN AUDIO TAPE WHICH I AM GOING TO BE MARKING PEOPLE'S 8, AND ON THE TAPE ITSELF IT STATES ALVARADO'S STATEMENT.

THE COURT: VERY WELL.

Q BY MS. NAKAKI: DETECTIVE COMSTOCK, OVER THE NOON HOUR DID YOU SEE THIS TAPE THAT'S MARKED PEOPLE'S 8, ALVARADO'S STATEMENT?

A YES.

Q AND, IF YOU KNOW, WERE THESE EXCERPTS OF [487] MR. ALVARADO'S INTERVIEW WITH YOU?

A YES.

MS. NAKAKI: YOUR HONOR, IF I MAY JUST HAVE THE WITNESS PLACE THE CASSETTE INTO THE RECORDER. WHAT I'M GOING TO DO IS PLAY THE FIRST PORTION OF THE TAPE AND SEE IF THE WITNESS RECOGNIZES THE VOICES ON THE TAPE AND STOP IT.

(WHEREUPON AN AUDIO TAPE MARKED ALVARADO'S STATEMENT, PEOPLE'S 8, WAS PLAYED.)

Q BY MS. NAKAKI: DETECTIVE COMSTOCK, DO YOU RECOGNIZE THE TWO VOICES ON THAT TAPE?

A YES.

Q THERE'S A FEMALE VOICE. WHOSE VOICE IS THAT?

A MINE.

Q THERE'S A SECOND VOICE ON THAT TAPE, A MALE VOICE. WHOSE VOICE IS THAT?

A MICHAEL ALVARADO.

Q IS MICHAEL ALVARADO IN THE COURTROOM TODAY?

A YES, HE IS.

Q CAN YOU POINT HIM OUT AND DESCRIBE WHAT HE'S WEARING IN COURT TODAY?

A THE WHITE DRESS SHIRT WITH THE TIE AT THE END OF COUNSEL TABLE.

THE COURT: INDICATING, FOR THE RECORD, THE DEFENDANT MICHAEL ALVARADO.

Q BY MS. NAKAKI: THE PERSON YOU IDENTIFIED IN [488] COURT TODAY IS THE INDIVIDUAL THAT YOU INTERVIEWED ON OCTOBER 24, 1995?

A YES.

Q AND THE PORTION OF THE TAPE THAT YOU HEARD IS THE INTERVIEW THAT YOU CONDUCTED ON OCTOBER 24, 1995, WITH MR. ALVARADO?

A YES.

Q PORTIONS OF IT?

A YES.

MS. NAKAKI: YOUR HONOR, IF I MAY, I'LL GO AHEAD AND PLAY THE TAPE.

THE COURT: ALL RIGHT.

RELIEVE THE REPORTER OF HER RESPONSIBILITIES?

MR. GUTIERREZ: YES. I WOULD STIPULATE.

MR. BERNSTEIN: I DO.

(WHEREUPON AN AUDIO TAPE MARKED ALVARADO'S STATEMENT, PEOPLE'S 8, WAS PLAYED.)

Q BY MS. NAKAKI: WITH REGARD TO THE TAPE THAT IS MARKED AS PEOPLE'S 8, IS THAT A FAIR RECORDATION OF THE INTERVIEW YOU HAD WITH MR. ALVARADO ON OCTOBER 24, 1995?

A YES.

* * * *

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LODGED
CLERK, U.S. DISTRICT COURT
JUN 12 2000
CENTRAL DISTRICT
OF CALIFORNIA

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
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APPEARANCES:

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FOR THE DEFENDANT-APPELLANT: IN PROPRIA PERSONA

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CHRISTIE SCHIZAS, CSR 8790

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT
NO. SO-E HON. PHILIP H. HICKOK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	)	NO. VA035109
VS.	)	
PAUL RAYMOND SOTO, DEFENDANT-APPELLANT.	)	

REPORTER'S TRANSCRIPT ON APPEAL
MARCH 12, 13, 14, 17, 1997
MAY 16, 1997
JULY 18, 1997

APPEARANCES:

FOR THE PEOPLE: GILBERT GARCETTI,
DISTRICT ATTORNEY
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12720 NORWALK BOULEVARD
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FOR THE DEFENDANT: PAUL R. SOTO
BARRY O. BERNSTEIN
ATTORNEY AT LAW
1901 AVENUE OF THE STARS
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CENTURY CITY, CALIFORNIA 90067

CHRISTIE SCHIZAS, CSR #8790

[547] THE COURT: BACK ON THE RECORD.

MR. GUTIERREZ.

MR. GUTIERREZ: YOUR HONOR, I WOULD LIKE TO PROCEED AT THIS TIME IF I MAY. I WOULD LIKE TO CALL MR. MICHAEL ALVARADO TO THE STAND.

THE CLERK: DO YOU SOLEMNLY SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

MICHAEL ALVARADO,

PRODUCED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANT ALVARADO, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE TAKE A SEAT IN THE WITNESS STAND. SAY YOUR NAME AND SPELL IT, PLEASE.

THE WITNESS: MICHAEL ALVARADO, M-I-C-H-A-E-L, A-L-V-A-R-A-D-O.

THE COURT: GO AHEAD.

MR. GUTIERREZ: THANK YOU, YOUR HONOR. AND I WOULD LIKE TO REMARK AS EXHIBIT "E" WHAT APPEARS TO BE A PHOTOGRAPH.

THE COURT: VERY WELL.

(WHEREUPON, A PHOTOGRAPH OF MICHAEL ALVARADO, DEFENSE EXHIBIT E, WAS MARKED FOR IDENTIFICATION.)

[548]

+DIRECT EXAMINATION

BY MR. GUTIERREZ:

Q GOOD MORNING, MR. ALVARADO.

A GOOD MORNING.

Q HAVE YOU EVER BEEN ON A WITNESS STAND BEFORE?

A NO, I HAVEN'T.

Q I WOULD LIKE YOU TO TRY TO SPEAK UP SO THAT THE JURY CAN HEAR YOU, AND PUT THAT MICROPHONE IN FRONT OF YOU.

A OKAY.

Q MR. ALVARADO, HOW OLD ARE YOU?

A I'M 18.

Q YOU HAVE A VERY LIGHT VOICE. JUST A LITTLE MORE. MAYBE A LITTLE CLOSER.

HOW OLD ARE YOU, SIR?

A 18.

Q WHAT IS YOUR DATE OF BIRTH?

A 3-13-78.

Q BACK IN SEPTEMBER OF '95, HOW OLD WERE YOU?

A 17.

Q AND BACK IN SEPTEMBER OF '95, WHERE WERE YOU LIVING?

A WAS LIVING IN THE CITY OF PICO RIVERA, RIGHT OFF TELEGRAPH ROAD.

Q WHAT WAS THE ADDRESS?

A 9853 WYLAND STREET.

Q YOU SAID IT'S RIGHT OFF OF TELEGRAPH ROAD?

[549] A YES.

Q IS THERE A MALL ON TELEGRAPH ROAD?

A YES.

Q IS THAT THE MALL THAT WE'VE BEEN TALKING ABOUT THE LAST FEW DAYS?

A YES. THE SANTA FE SPRINGS PROMENADE MALL.

Q DO YOU KNOW HOW MANY MILES, WHAT DISTANCE IT IS FROM YOUR HOUSE?

A MAYBE A HALF A MILE.

Q IS IT WALKING DISTANCE?

A YES.

Q DID YOU EVER WALK THAT DISTANCE BEFORE?

A YES. I WOULD WALK THERE OFTEN.

Q HOW LONG HAVE YOU BEEN GOING TO THAT MALL?

A MOSTLY ALL MY LIFE REALLY, SHOPPING THERE WITH FAMILY AND EVERYBODY.

Q BACK IN SEPTEMBER OF '95, DID YOU FREQUENT THE MALL ALSO?

A YES, I DID.

Q HOW OFTEN WOULD YOU GO TO THE MALL IN SEPTEMBER OF '95?

A JUST ABOUT EVERY DAY, MAYBE.

Q MICHAEL, YOU ARE CHARGED WITH MURDER. YOU ARE CHARGED WITH THE MURDER OF

FRANCISCO CASTANEDA. DID YOU KILL MR. FRANCISCO CASTANEDA?

A NO, I DID NOT.

MS. NAKAKI: OBJECTION. THAT'S ASKING THIS WITNESS FOR A LEGAL CONCLUSION. MOTION TO STRIKE.

[550] THE COURT: OVERRULED.

Q BY MR. GUTIERREZ: DID YOU EVER INTEND FOR MR. FRANCISCO CASTANEDA TO BE KILLED?

A NO, I DID NOT.

Q DID YOU EVER ROB MR. FRANCISCO CASTANEDA?

A NO, I DID NOT. I WOULD NEVER DO ANYTHING LIKE THAT.

Q DID YOU EVER ASSAULT MR. FRANCISCO CASTANEDA?

A NO, I DID NOT.

Q DID YOU EVER TALK TO MR. FRANCISCO CASTANEDA?

A NO.

Q DID YOU EVER TOUCH HIS PERSON?

A NO.

Q DID YOU EVER TOUCH HIS CAR?

A NO, I DID NOT.

Q DID YOU EVER TOUCH THE CONTENTS OF HIS CAR?

A NO, I DID NOT.

Q DID YOU HAVE A GUN THERE WHILE YOU WERE AT THE MALL?

A NO, I DID NOT.

Q DID YOU HAVE BULLETS WHILE YOU WERE AT THE MALL?

A NO.

Q DID YOU EVER PLAN THAT MR. CASTANEDA SHOULD BE KILLED?

A NO.

Q DID YOU EVER PLAN THAT MR. CASTANEDA

--

MS. NAKAKI: YOUR HONOR, OBJECT TO THIS LINE OF [551] QUESTIONING. IT'S ALL LEADING.

THE COURT: SUSTAINED.

Q BY MR. GUTIERREZ: ON THE NIGHT THAT MR. CASTANEDA DIED WERE YOU EVER ON THE DRIVER'S SIDE OF HIS VEHICLE?

A NO, I WAS NOT.

Q DID YOU EVER TALK TO HIM?

A NO, I DID NOT.

Q DID YOU EVER MAKE ANY REQUEST OF MR.

--

MS. NAKAKI: YOUR HONOR, SAME OBJECTION. THIS IS LEADING.

THE COURT: IT'S LEADING.

Q BY MR. GUTIERREZ: MR. ALVARADO, LET'S GO BACK, THEN, AND START FROM THE BEGINNING.

ON SEPTEMBER 23, PRIOR TO THAT DAY DID YOU KNOW PAUL SOTO?

A NO, I DID NOT.

Q HAD YOU, PRIOR TO SEPTEMBER 23, EVER SPENT TIME OR SOCIALIZED WITH PAUL SOTO?

A NO.

Q WHEN WAS THE FIRST TIME THAT YOU ACTUALLY MET PAUL SOTO?

A ON THE DAY OF THIS INCIDENT.

Q ON SEPTEMBER 23?

A YES.

Q NOW, YOU WERE TAKEN -- YOU WENT TO A POLICE STATION IN OCTOBER?

[552] A YES.

Q HOW DID YOU GET THERE?

A EXCUSE ME?

Q HOW DID YOU GET THERE?

A TAKEN TO THE POLICE STATION BY MY FATHER.

Q AND WHEN YOU FATHER TOOK YOU THERE, DID YOU GO IN THERE?

A YES.

Q WALK IN?

A YES.

Q WHERE DID YOU GO ONCE YOU GOT TO THE POLICE STATION?

A I WAS JUST GOING BY MS. COMSTOCK TO A BACK INTERVIEW ROOM, I GUESS.

Q AND WHAT WERE THE CONTENTS OF THE INTERVIEW ROOM? WAS THERE A TABLE? A CHAIR?

A JUST A TABLE AND TWO CHAIRS.

Q WAS THERE A DOOR TO THE INTERVIEW ROOM?

A YES.

Q WAS IT OPEN OR CLOSED?

A I CAN'T REMEMBER.

Q NOW, HAD YOU EVER BEEN IN A POLICE INTERVIEW ROOM BEFORE?

A NO, I HADN'T.

Q AND YESTERDAY THERE WAS REFERENCE TO PEOPLE'S EXHIBIT 9.

MR. GUTIERREZ: MAY I APPROACH, YOUR HONOR?

THE COURT: YES, YOU MAY.

[553] Q BY MR. GUTIERREZ: I WOULD LIKE YOU TO LOOK AT PEOPLE'S EXHIBIT 9. IT SAYS, "THE EXPLANATION OF ADMONITION AND USE OF WAIVER OF YOUR RIGHTS."

DID YOU EVER SIGN A CARD LIKE THAT?

MS. NAKAKI: OBJECTION, YOUR HONOR, REGARDING THAT PARTICULAR EXHIBIT AND THIS LINE OF QUESTIONING.

MR. GUTIERREZ: I THOUGHT I MADE THE RECORD THIS MORNING WITH PEOPLE VERSUS JIMENEZ AND KENTUCKY VERSUS --

THE COURT: EXHIBIT 9 IS RELATIVE TO MR. SOTO, RIGHT?

MR. GUTIERREZ: YES, YOUR HONOR. JUST ASKING, DID HE -- WAS HE EVER SHOWN ANYTHING OF THIS SORT.

THE COURT: HE MAY ANSWER THAT.

THE WITNESS: NO, I WAS NOT.

Q BY MR. GUTIERREZ: HOW LONG WAS THE INTERVIEW ABOUT?

A IT SEEMED MAYBE TWO HOURS OR SO, TWO AND A HALF HOURS.

Q WERE YOU A LITTLE NERVOUS?

A YES, I WAS.

Q YOU SAY YOU HAD NEVER BEEN IN AN INTERVIEW ROOM BEFORE. DID YOU EVER STOP THE

INTERVIEW AND GO TALK TO YOUR PARENTS OR GO GET A DRINK OF WATER OR GO TO THE BATHROOM?

A NO. I NEVER LEFT THE INTERVIEW.

Q YOU REMAINED THERE?

A YES.

Q AFTER THIS INTERVIEW WAS COMPLETED, WHERE DID YOU GO?

[554] A I WENT BACK HOME TO MY HOUSE WITH MY FATHER.

Q AND LATER ON THAT YEAR, WERE YOU ASKED TO GO BACK TO THE POLICE STATION?

A YES. I BELIEVE MY PARENTS RECEIVED A CALL, AND THEY HAD ASKED ME TO TURN MYSELF IN OR THERE WOULD BE WARRANTS OUT FOR ME.

Q WHEN YOU RECEIVED A CALL TO TURN YOURSELF IN, WHAT DID YOU DO?

A THE NEXT MORNING I TURNED MYSELF IN.

Q YOU WENT BACK TO THE POLICE STATION?

A YES.

Q YOU WERE ARRESTED?

A YES.

Q CHARGED WITH MURDER?

A YES.

Q MICHAEL -- EXCUSE ME -- MR. ALVARADO, THIS MALL THAT YOU HAD BEEN FREQUENTING FOR A GOOD PART OF YOUR LIFE, CAN YOU DESCRIBE THE MALL? WHAT KIND OF STORES ARE THERE?

A THERE'S FAST FOOD STORES THERE, CLOTHING STORES, SHOE STORES. I BELIEVE THERE'S ELECTRIC COMPANY STORE THERE, CLEANERS. THERE ARE A LOT OF STORES THERE, DIFFERENT STORES.

Q WHAT ABOUT A BARBER?

A YES. THERE'S A BARBER SHOP AROUND THE BACK.

Q DID YOU EVER USE ANY OF THE STORES IN THAT PLACE?

A JUST ABOUT EVERY ONE OF THEM.

[555] Q BARBER SHOP?

A BARBER SHOP, THE VIDEO STORE, CLEANERS, AND THE RESTAURANTS THERE.

Q AND, MR. ALVARADO, THERE WAS A REFERENCE IN YOUR STATEMENT TO TOWN CENTER. WHAT IS THE TOWN CENTER?

A TOWN CENTER HALL IS A -- LIKE A PLACE FOR -- REALLY FOR YOUTH. AND THEY GO, AND SOMETIMES THEY -- IN SOME CASES THEY TEACH YOU TO BE A RECREATION LEADER, OR YOU CAN GO THERE FOR SCHOOL CREDIT. THERE ARE DIFFERENT REASONS. SOME PEOPLE JUST GO, AND IT'S A PLACE TO HANG OUT INSTEAD OF BEING OUT ON THE STREETS.

Q HOW FAR IS THE TOWN CENTER FROM THIS MALL ON TELEGRAPH ROAD?

A MAYBE A BLOCK, BLOCK AND A HALF.

Q PRIOR TO SEPTEMBER 23RD OF '95, HOW LONG HAVE YOU BEEN FREQUENTING THE TOWN CENTER ABOUT A BLOCK, BLOCK AND A HALF FROM THE MALL?

A I REALLY CAN'T REMEMBER HOW LONG. I KNOW IT WAS MAYBE MORE THAN HALF A YEAR OR SO.

Q DO YOU KNOW WHERE SANTA FE HIGH SCHOOL IS?

A YES, I DO.

Q WHERE IS SANTA FE HIGH SCHOOL AT?

A IT'S DOWN THE STREET, ON ORR AND DAY ROAD, FROM THE PROMENADE MALL.

Q ABOUT HOW FAR IS SANTA FE HIGH SCHOOL FROM THE MALL?

A MAYBE TWO BLOCKS OR SO.

Q WALKING DISTANCE?

[556] A YES.

Q PRIOR TO SEPTEMBER 23 OF '95, DID YOU EVER ATTEND SANTA FE?

A YES, I DID. I ATTENDED SANTA FE FOR, I BELIEVE, TWO YEARS.

Q AND WHILE YOU WERE AT SANTA FE, DID YOU EVER FREQUENT THE MALL WHILE YOU WERE GOING TO SCHOOL THERE?

A YES. JUST ABOUT EVERY DAY THAT -- WE WOULD HAVE OPEN CAFÉ AND GO FOR LUNCH, THINGS LIKE THAT.

Q YOU INDICATED YOU KNOW ALL THE STORES AT THE MALL, THAT YOU'VE PATRONIZED THE STORES AT THE MALL. DO YOU KNOW SOME OF THE PEOPLE THAT WORK AT THE MALL?

A YES, I DO.

Q DO YOU KNOW IF THERE'S A POLICE STATION OR A SUBSTATION THERE AT THE MALL?

A YES. THERE'S A SERVICE STATION AT THE CORNER OF THE MALL BY THE KENTUCKY FRIED CHICKEN.

Q AND WHAT DOES THE SERVICE STATION CONTAIN?

A I DON'T KNOW WHAT IT CONTAINS.

Q DID YOU EVER SEE POLICE CARS THERE?

A YES.

Q WHAT ABOUT ON SEPTEMBER 23? THAT NIGHT DID YOU EVER SEE A POLICE STATION CAR THERE?

A YES, I DID. THERE WAS, I BELIEVE, A BLACK-AND-WHITE CAR IN THE MIDDLE OF THE DRIVEWAY WITH THE MOTOR RUNNING AND LIGHTS ON, AND THERE WERE OTHER -- I'M NOT SURE IF THEY WERE POLICE OR THE SERVICEMEN THERE, BUT THEY

SEEMED TO BE TALKING TO THE OFFICERS IN THE CAR.

[557] Q AND THIS POLICE STATION OR SUBSTATION THAT'S AT THE MALL, YOU SAID IT'S BY THE KENTUCKY FRIED CHICKEN PLACE. MANY OF US ARE NOT AS FAMILIAR WITH THE MALL AS YOU ARE. WHERE IS KENTUCKY FRIED CHICKEN LOCATED ON THIS STRIP MALL?

A IT'S TOWARDS THE END OF THE MALL GOING TOWARDS THE TOWN CENTER. THEY ARE BOTH ON THE CORNER OF THE MALL ON THE CORNER OF, I BELIEVE, TELEGRAPH AND JERSEY ROAD.

Q DO YOU KNOW YOUR DIRECTIONS? SORT OF WEST/EAST, NORTH/SOUTH?

A A LITTLE BIT.

Q FOR EXAMPLE, THE 605 FREEWAY, DOES THAT RUN WEST/EAST, NORTH/SOUTH?

A I BELIEVE NORTH/SOUTH.

Q AND TELEGRAPH ROAD, DOES THAT RUN NORTH/SOUTH, WEST/EAST?

A WEST/EAST.

Q SO WHEN YOU SAY THAT THE SUBSTATION IS BY THE KENTUCKY FRIED CHICKEN RESTAURANT ON THE OTHER SIDE OF THE MALL, WOULD THAT BE ON THE WEST SIDE OF THE MALL OR THE EAST SIDE OF THE MALL?

A I BELIEVE IT WOULD BE ON THE EAST SIDE OF THE MALL.

Q WHERE WOULD THE TOWN CENTER BE? EAST OF THE MALL?

A EAST OF THE MALL, YES.

Q WHAT ABOUT SANTA FE HIGH SCHOOL? WHERE WOULD THAT BE?

[558] A I BELIEVE THAT WOULD BE SOUTH OF THE MALL.

Q AND YOUR HOME, IT WAS MAYBE A HALF A MILE FROM THE TOWN CENTER. WHERE WOULD THAT BE IN LOCATION TO THE STRIP MALL?

A IT WOULD BE NORTHWEST OF THE MALL, MAYBE.

Q AND MANUEL RIVERA'S HOME, WHERE HE WAS LIVING BACK IN SEPTEMBER OF '95, WHERE WOULD THAT BE IN RELATION TO THE STRIP MALL, I F YOU KNOW?

A SOUTH OF THE MALL. IT WOULD BE BEHIND THE MALL.

Q WHEN YOU SAY "BEHIND THE MALL," WOULD IT BE DIRECTLY BEHIND THE MIDDLE OF THE MALL OR MORE TOWARDS ONE AREA?

A MORE TOWARDS THE EAST END OF THE MALL.

Q MR. ALVARADO, PEOPLE'S EXHIBIT 2 IS A PHOTOGRAPH OF YOU IN A T-SHIRT. YOUR HAIR IS SHORT, KIND OF BALD. WHERE WAS THAT TAKEN?

A I BELIEVE AT THE SHERIFF'S STATION.

Q AND HOW LONG HAD YOU HAD SHORT HAIR OR A BALD HEAD?

A MOST OF MY LIFE I HAVE.

Q WHEN DID YOU START WEARING SHORT HAIR?

A MAYBE FOURTH, FIFTH GRADE. AROUND THERE.

Q PREVIOUSLY MARKED DEFENSE EXHIBIT "E," PREVIOUSLY SHOWN TO COUNSEL --

MR. GUTIERREZ: YOUR HONOR, MAY I APPROACH?

THE COURT: YES.

Q BY MR. GUTIERREZ: THIS PHOTOGRAPH OF YOU, DO [559] YOU KNOW WHAT CALENDAR PERIOD THAT COVERS?

A I BELIEVE '94, '95, I BELIEVE.

Q '94, '95?

A YES.

Q AND YOU ALSO HAD SHORT HAIR BACK THEN?

A YES.

Q WHILE I'M UP HERE, MR. ALVARADO, I WANT YOU TO --

MR. GUTIERREZ: WITH THE COURT AND PLAINTIFF'S PERMISSION, MAY HE APPROACH THE DIAGRAM?

THE COURT: YES.

Q BY MR. GUTIERREZ: MR. ALVARADO, WOULD YOU BE KIND ENOUGH TO STEP DOWN. I WANT YOU

TO LOOK AT WHAT HAS BEEN MARKED AS PEOPLE'S 1.

JUST SO THAT YOU CAN GET YOUR BEARINGS, HAVE YOU SEEN THIS PHOTOGRAPH BEFORE?

A YES, I HAVE.

Q TAKE A LOOK AT IT. WHAT DOES THAT DEPICT?

A LOOKS LIKE AN AERIAL PHOTOGRAPH OF THE MALL.

Q YOU ARE GOING TO HAVE TO SPEAK UP.

WHAT DOES IT LOOK LIKE?

A THE AERIAL PHOTOGRAPH OF THE PROMENADE MALL.

Q AND PHOTOGRAPH PEOPLE'S 1-B, WHAT AREA DOES THAT DEPICT, IF YOU KNOW?

A LOOKS LIKE THE EAST END OF THE MALL AND SOME OF THE HOUSES BEHIND IT.

Q AND PHOTOGRAPH "A"?

A THE MIDDLE OF THE MALL WHERE THE DUMPSTER IS [560] AT.

Q YOU HAVE TO SPEAK UP.

ONCE AGAIN?

A THE MIDDLE OF THE MALL WHERE THE DUMPSTER IS.

Q PHOTOGRAPH "AA," IDENTIFIED BY MR. BERNSTEIN'S EXAMINATION?

A THAT'S THE FRONT OF JACK'S MARKET, THE TELEPHONE AREA.

Q HAVE YOU EVER SHOPPED AT JACK'S MARKET?

A YES, I HAVE.

Q ARE THERE TELEPHONES IN FRONT OF JACK'S MARKET?

A YES, THERE ARE.

Q WHEN YOU LOOK AT PEOPLE'S 1-B, WITH THIS POINTER COULD YOU SHOW THE JURY

APPROXIMATELY MORE OR LESS WHERE IT WAS THAT MANUEL LIVED BACK IN SEPTEMBER OF 1995?

A I BELIEVE RIGHT HERE (INDICATING).

Q AND IS THERE A CIRCLE AROUND THAT?

A YES. ORANGE CIRCLE.

Q DOES MANUEL RIVERA'S HOUSE HAVE A BACK GATE?

MS. NAKAKI: YOUR HONOR, FOR THE RECORD, THE WITNESS POINTED TO -- POINTED AT PEOPLE'S 1-B, THE UPPER RIGHT PHOTOGRAPH.

THE COURT: RIGHT.

MR. GUTIERREZ: FOR THE RECORD, YES. THANK YOU, COUNSEL.

Q SIR, WHERE IS THE FRONT OF MANUEL RIVERA'S HOUSE ON PHOTOGRAPH PEOPLE'S 1-B?

[561] A IT'S DOWN IN THE LOWER LEFT CORNER.

Q AND IS THERE A REAR GATE TO MANUEL RIVERA'S HOUSE?

A YES, THERE IS.

Q WHERE IS THAT LOCATED, SIR?

A IT WOULD BE THE BACK OF MANUEL'S HOUSE WHERE THEIR ALLEY RUNS.

MR. GUTIERREZ: FOR THE RECORD, MY QUESTIONS WILL ALL BE PERTAINING TO PEOPLE'S 1-B, RATHER THAN JUST REIDENTIFYING IT.

Q AND THE GATE, WHERE DOES MANUEL RIVERA'S GATE LEAD TO, THE REAR GATE?

A IT LEADS TO -- WHICH I BELIEVE RUNS TO THE WEST -- AN ALLEY, AND IT LEADS TO THE BACK ENTRANCE TO THE MALL.

Q DO YOU SEE THE ENTRANCE TO THE MALL IN THAT PHOTOGRAPH?

A YES, I DO.

Q WHERE WAS THAT? MAYBE YOU CAN POINTS IT OUT TO THE LADIES AND GENTLEMEN OF THE JURY.

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A THE ENTRANCE OF THE MALL GOES RIGHT IN HERE (INDICATING).

MR. GUTIERREZ: FOR THE RECORD, YOUR HONOR, IT APPEARS THAT HE IS POINTING TO WHAT APPEARS TO BE SORT OF A WIDE STREET GOING IN A NORTHERLY DIRECTION JUST EAST OF WHAT HAS BEEN IDENTIFIED AS MANUEL RIVERA'S HOME.

Q HOW FAR IS MANUEL RIVERA'S REAR GATE TO THE ENTRANCE OF THE MALL, IF YOU KNOW? AND IF YOU WANT, YOU CAN [562] POINT TO AN OBJECT IN THIS COURTROOM SO WE CAN VISUALIZE IT.

A MAYBE JUST A LITTLE OUTSIDE OF THE COURTROOM.

Q WHEN YOU ENTER THE MALL, WHERE IS THE POLICE SUBSTATION?

A IT WOULD BE JUST TO YOUR RIGHT.

Q AND DO YOU SEE THAT AREA IN THE PHOTOGRAPH?

A YES, I DO.

Q TELL THE LADIES AND GENTLEMEN OF THE JURY APPROXIMATELY WHERE THE POLICE SUBSTATION IS IN RELATION TO THE ENTRANCE OF THE MALL BY MANUEL RIVERA'S HOME?

A BY THE ENTRANCE OF THE MALL. IT'S JUST TO YOUR RIGHT. AS YOU ENTER THE MALL, THE SUBSTATION IS RIGHT HERE, AND THE ENTRANCE OF THE MALL IS RIGHT HERE (INDICATING).

MR. GUTIERREZ: MAY THE RECORD REFLECT HE'S POINTED TO WHAT APPEARS TO BE A BROWNISH ROOF JUST RIGHT OF A BUILDING WITH RED PAINT AROUND IT, SOMETHING TO THAT EFFECT?

THE COURT: VERY WELL.

Q BY MR. GUTIERREZ: AND HOW FAR IS THE SUBSTATION FROM THE ENTRANCE TO THE MALL? AND I KNOW YOU PROBABLY NEVER MEASURED IT. IF YOU WANT, WE CAN TRY TO VISUALIZE THAT DISTANCE IF IT HELPS YOU.

A MAYBE JUST OUTSIDE THE COURTROOM FROM THE ENTRANCE OF THE MALL TO THE SUBSTATION.

Q AS YOU ENTER THE MALL, FROM MANUEL'S HOUSE CAN YOU ACTUALLY SEE THE SUBSTATION?

A YES, YOU CAN. YES, YOU CAN. VERY GOOD.

Q IT'S CLEAR?

[563] A VERY CLEARLY, YES.

Q ANY OBSTRUCTIONS?

A NO.

Q AND YOU INDICATED THAT THAT NIGHT YOU SAW A POLICE CAR. DO YOU SEE THE AREA WHERE THE BLACK-AND-WHITE WAS ON SEPTEMBER 23?

A YES. I DO.

Q WHERE IS THAT AREA?

A IT'S JUST IN FRONT OF THE POLICE SUBSTATION SERVICE CENTER.

MR. GUTIERREZ: YOUR HONOR, APPEARS TO BE DIRECTLY BELOW WHAT HE HAS IDENTIFIED AS THE POLICE SUBSTATION, WHICH BASICALLY IS THE BUILDING OR PART OF THE BUILDING THAT IS IN THE FARTHEST EAST SIDE OF THE MALL, BASICALLY THE NORTHEAST CORNER OF TELEGRAPH ROAD, THAT BUILDING. I DON'T KNOW IF THAT'S CLEAR OR NOT.

Q AND THE JACK'S MARKET THAT HAS BEEN REFERRED TO OVER THE LAST SEVERAL DAYS, SIR, DO YOU SEE THAT AREA IN THE AERIAL PHOTOGRAPH?

A YES, I DO.

Q POINT THAT OUT TO THE LADIES AND GENTLEMEN OF THE JURY.

A IT WOULD BE THE BIG ROOF OVER HERE (INDICATING).

MR. GUTIERREZ: POINTING TO WHAT APPEARS TO BE ALMOST THE CENTER OF THE PHOTOGRAPH, TO THE TOP LEFT CORNER. IT'S A LARGE RECTANGULAR GRAY ROOF, PERHAPS THE -- IT'S ALMOST CONTINUOUS BUILDINGS, BUT I WOULD SAY IT WOULD BE THE FOURTH [564] BUILDING FROM THE LEFT OF THE PHOTOGRAPH THAT IS FROM EAST TO WEST.

THE COURT: SO INDICATING.

Q BY MR. GUTIERREZ: AND THE -- YOSHIMA?

A YOSHINOYA.

Q DO YOU SEE THAT RESTAURANT THERE ON THE PHOTOGRAPH?

A YES, I DO.

Q WHERE IS THAT?

A THAT IS ON THE TOP LEFT CORNER, THE SMALL ROOF.

Q DIRECTLY IN FRONT OF YOSHINOYA, OR DIRECTLY SOUTH OF YOSHINOYA, WHAT IS THERE, IF YOU KNOW?

A THERE'S SOME PARKING STRUCTURES AND A DUMPSTER WITH PLANTERS AROUND IT.

Q THE DUMPSTER THAT IS DIRECTLY IN FRONT OF YOSHINOYA, DO YOU SEE THAT IN ANY OF THE PHOTOGRAPHS HERE?

A YES. IN THREE OF THE PHOTOGRAPHS. RIGHT HERE, RIGHT HERE, AND RIGHT HERE (INDICATING).

MR. GUTIERREZ: FOR THE RECORD, HE'S REFLECTED TO A DUMPSTER IN PEOPLE'S 1-C, DEFENSE EXHIBIT "A," AND DEFENSE EXHIBIT -- I BELIEVE DOUBLE "D."

THE COURT: VERY WELL.

Q BY MR. GUTIERREZ: ON SEPTEMBER 23 OF 1995 -- LET'S GO TO THE DAY PRIOR TO THE EARLY MORNING OF SEPTEMBER 23. SEPTEMBER 22, 1995, WHAT WERE YOU DOING THAT AFTERNOON?

A ON SEPTEMBER 22?

Q YES.

[565] A I CAN'T REMEMBER.

Q DID YOU HAVE OCCASION TO GO TO SOMEBODY'S HOUSE ON THE 22?

A YES, I DID.

Q AND WHOSE HOUSE DID YOU GO TO?

A I BELIEVE MR. RIVERA'S.

Q AND ABOUT WHAT TIME WAS IT THAT YOU ARRIVED AT MANUEL RIVERA'S HOUSE?

A I CAN'T REMEMBER THE EXACT TIME, BUT MAYBE EARLY AFTERNOON.

Q WHEN YOU SAY "EARLY AFTERNOON" --

A MAYBE 3:00 OR 4:00.

Q HOW IS IT THAT YOU ARRIVED TO MANUEL RIVERA'S HOUSE IN THE EARLY AFTERNOON?

A I BELIEVE AT FIRST I WALKED FROM MY HOUSE.

Q AND WHEN YOU WALKED TO MANUEL RIVERA'S HOUSE, WERE YOU ALONE, OR WERE YOU ACCOMPANIED BY SOMEONE?

A AT FIRST, I BELIEVE I WALKED ALONE.

Q AND WHO DID MANUEL RIVERA LIVE WITH BACK THEN?

A I BELIEVE HIS MOTHER, STEPFATHER, AND TWO BROTHERS AND A LITTLE SISTER.

Q AND THE TWO BROTHERS, WERE THEY OLDER THAN HIM.

A NO. THEY WERE HIS LITTLE BROTHERS.

Q THEY WERE YOUNG?

A YES.

Q WHAT ABOUT THE LITTLE GIRL THAT YOU REFERRED TO? WAS SHE YOUNG?

[566] A YES. SHE WAS YOUNGER THAN MANUEL.

Q PRIOR TO SEPTEMBER 23 OF '95, HAD YOU EVER SPENT THE NIGHT AT MANUELS' HOUSE?

A YES, I HAD. MANY TIMES.

Q PRIOR TO SEPTEMBER 23 OF 1995, HAD HE EVER SPENT THE NIGHT AT YOUR HOUSE?

A YES, HE HAS.

Q WHO WERE YOU LIVING WITH BACK ON SEPTEMBER 23, 1995?

A I WAS LIVING WITH MY PARENTS AND MY TWO YOUNGER SISTERS AND MY OLDER SISTER.

Q ONCE YOU ARRIVED AT MANUEL'S HOME THE EARLY AFTERNOON OF SEPTEMBER 22, 1995, ONCE YOU WALKED THERE, WHAT HAPPENED NEXT?

A I BELIEVE WE WENT IN HIS HOUSE FOR, I BELIEVE, A FEW MINUTES, AND THEN WE WALKED TO THE TOWN CENTER HALL.

Q AND WHEN YOU WALKED TO THE TOWN CENTER HALL WITH MANUEL, DID ANYONE ELSE JOIN YOU?

A I BELIEVE WE MET UP WITH JASON ALONG THE WAY ON THE WALK OVER THERE.

Q AND ANYONE ELSE JOIN YOU AS YOU WALKED OVER?

A NO. I CAN'T REMEMBER ANYBODY ELSE JOINING.

Q ONCE YOU ARRIVED AT THE TOWN CENTER THE EARLY AFTERNOON OF SEPTEMBER 22, WHAT DID YOU DO THERE?

A WE WENT IN. AND YOU SIGN IN AS YOU GO IN, AND MARK THE TIME YOU GET THERE. AND WE

JUST REALLY SEEN WHO ELSE WAS THERE WHO WE KNOW OR WHAT OTHER FRIENDS THAT WERE THERE.

[567] Q HOW LONG DID YOU STAY AT THE TOWN CENTER?

A MAYBE 20, 30 MINUTES OR SO.

Q DID YOU SEE ANY OTHER FRIENDS THAT YOU KNEW BACK THEN?

A YES, I DID.

Q WHO DID YOU SEE?

A I BELIEVE VALERIE WAS THERE AND DESMOND, AND I BELIEVE TONI AND SONJA WERE THERE, ALSO.

Q WAS VALERIE THERE BEFORE YOU GOT THERE OR AFTER?

A I THINK SHE WAS BEFORE I GOT THERE.

Q WHAT ABOUT DESMOND?

A YES. I BELIEVE HE WAS THERE BEFORE US.

Q AND BY "VALERIE" AND "DESMOND," ARE YOU REFERRING TO THE INDIVIDUALS WHO TESTIFIED EARLIER, VALERIE GARCIA AND DESMOND PACHECO?

A YES.

Q YOU SAID THAT TONI AND SONJA -- WERE THEY THERE, ALSO?

A YES.

Q DID YOU SEE THEM ARRIVE, OR THEY WERE ALREADY THERE?

A I BELIEVE THEY WERE ALREADY THERE, ALSO. I BELIEVE THEY WENT RIGHT FROM AFTER SCHOOL.

Q DO YOU KNOW HOW THEY GOT THERE?

A NO, I DON'T KNOW.

Q NOW, AFTER YOU ARRIVED AT THE TOWN CENTER AND VALERIE AND DESMOND AND TONI AND SONJA WERE THERE THE EARLY [568] AFTERNOON OF

SEPTEMBER 22, WHAT IS THE NEXT THING YOU RECALL DOING?

A I BELIEVE ME AND MANUEL AND JASON LEFT AND WENT BACK TO -- WALKED BACK TO MANUEL'S HOUSE.

Q AND DO YOU KNOW MORE OR LESS WHAT TIME YOU RETURNED TO MANUEL'S HOUSE?

A NO, I DON'T.

Q WHEN YOU RETURNED TO MANUEL'S HOUSE, WAS ANYONE ELSE HOME?

A I BELIEVE HIS MOTHER AND TWO YOUNGER BROTHERS WERE THERE.

Q WHEN YOU AND MANUEL AND JASON RETURNED TO MANUEL'S HOME, WHAT DID YOU DO?

A WE JUST REALLY SAT AROUND AND -- TALKING AND EVERYTHING, TALKING TO HIS MOTHER AND EVERYTHING.

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Q AND DID ANYBODY ELSE COME OVER DURING THE COURSE OF THAT AFTERNOON OR EARLY EVENING?

A YES. I BELIEVE SONJA AND TONI CAME, AND VALERIE, I BELIEVE.

Q DID SONJA AND TONI AND VALERIE COME TOGETHER OR COME SEPARATE?

A I BELIEVE THEY CAME TOGETHER.

Q DO YOU KNOW ABOUT WHAT TIME IT WAS THAT TONI AND SONJA AND VALERIE ARRIVED AT MANUEL'S HOME?

A DO, I DON'T. IT WAS GETTING DARK. I THINK IT WAS ALREADY DARK BY THE TIME THEY GOT THERE.

Q WHERE WERE YOU WHEN VALERIE AND TONI AND SONJA ARRIVED AT MANUEL'S HOUSE WHILE IT WAS GETTING DARK?

[569] A I WAS INSIDE MANUEL'S ROOM.

Q IS THAT HIS BEDROOM?

A YES, HIS BEDROOM.

Q DOES HE HAVE A LARGE BEDROOM? SMALL BEDROOM? CAN YOU GIVE US A WORD PICTURE SO WE CAN HAVE AN IDEA?

A MAYBE A LARGE BEDROOM.

Q DID IT HAVE FURNITURE?

A YES. HE HAD, I BELIEVE, LIKE A SMALL RECLINER CHAIR AND A LARGE CABINET AND TWO SMALL CABINETS, AND HE HAD A LARGE BED, I BELIEVE, A QUEEN-SIZE OR KING-SIZE BED.

Q ANY OTHER TABLES, DRESSERS, OR CHAIRS?

A NO. I THINK THAT WAS EVERYTHING.

Q WHAT WERE YOU DOING IN MANUEL'S ROOM WHEN SONJA, TONI, AND VALERIE ARRIVED?

A I BELIEVE WE WERE JUST SITTING AROUND LISTENING TO THE RADIO.

Q AND WHAT HAPPENED AFTER THOSE GIRLS ARRIVED?

A I THINK THEY WENT AND GOT BEER. GOTTEN SOME BEER OR SOMETHING.

Q DO YOU REMEMBER BEER?

A YES.

Q AT THE LOCATION?

A YES.

Q WHAT KIND OF BEER WAS IT?

A THERE WERE BUDWEISER, THE 40-OUNCE BOTTLES, AND THERE WAS BOONE'S STRAWBERRY HILL AND, I BELIEVE, A BOTTLE -- FULL BOTTLE OF VODKA OR TEQUILA.

Q DO YOU KNOW IF THERE HAD BEEN ANY ALCOHOL IN [570] THE HOUSE BEFORE THEIR ARRIVING?

A I DON'T KNOW. I DON'T THINK THERE WAS.

Q DO YOU KNOW FOR SURE?

A NO, I DON'T. BUT THE ALCOHOL THAT WAS BROUGHT, IT WAS IN BAGS LIKE FROM A STORE.

Q AND DO YOU KNOW WHO BROUGHT THE BEER?

A I'M NOT REALLY SURE WHO BROUGHT IT BECAUSE I WAS IN THE ROOM AND IT WAS BROUGHT TO THE ROOM.

Q DID YOU GO TO THE STORE TO GET THE BEER?

A NO, I DID NOT.

Q YOU JUST REMEMBER BEER COMING IN?

A YES.

Q IN BAGS?

A YES.

Q WHAT HAPPENED AFTER THE BEER AND BAGS CAME?

A WELL, EVERYBODY JUST CONTINUED TO SIT AROUND AND LISTEN TO THE RADIO AND HAD THEIR

OWN BEER WITH THEM OR THEIR OWN DRINKS, AND EVERYBODY WAS JUST PRETTY MUCH DRINKING.

Q HOW ABOUT YOU? WERE YOU DRINKING?

A YES, I WAS.

Q WHAT WERE YOU DRINKING?

A THE BUDWEISER 40-OUNCE, AND I BELIEVE I HAD BOONE'S STRAWBERRY HILL.

Q ABOUT WHAT TIME WAS IT THAT PEOPLE STARTED DRINKING?

A I DON'T REALLY RECALL.

Q WAS IT DAYLIGHT?

[571] A NO. IT WAS IN THE EVENING. MAYBE 7:00 OR 8:00, 9:00, MAYBE. AROUND THERE.

Q THAT'S WHEN YOU STARTED DRINKING AT MANUEL'S HOUSE?

A YES.

Q HAD YOU BEEN DRINKING AT MANUEL'S HOUSE EARLIER THAT EVENING?

A NO.

Q HOW ABOUT EARLIER THAT DAY? DID YOU --

A NO.

Q -- DRINK ANYTHING?

A NO, I DID NOT.

Q AND IN ADDITION TO DRINKING BEER AND WINE, WERE THERE ANY DRUGS THERE?

A YES. THERE WAS MARIJUANA.

Q AND WHERE WAS THE MARIJUANA?

A WELL, IT WAS IN THE ROOM OVER THERE, BUT --

Q DO YOU KNOW HOW THE MARIJUANA GOT THERE?

A NO, I DON'T.

Q AND HOW MUCH MARIJUANA WAS THERE?

A I NEVER REALLY SAW HOW MUCH, BUT I MAYBE SEEN A COUPLE JOINTS OR SO.

Q DID YOU PARTAKE IN THE MARIJUANA, TOO?

A YES, I DID.

Q AND HOW MUCH MARIJUANA DID YOU SMOKE?

A MAYBE A JOINT OR SO.

Q WAS THAT THROUGHOUT THE EVENING?

A WELL, THAT WAS ALL AT ONE TIME.

[572] Q HOW ABOUT BEER? HOW MUCH BEER DO YOU THINK YOU DRANK?

A MAYBE ALMOST TWO OF THE 40 OUNCES.

Q FORTY OUNCES ARE THE LARGE BEERS?

A YES.

Q YOU THINK YOU HAD TWO?

A YES. AROUND TWO.

Q HOW ABOUT WINE? HOW MUCH WINE?

A MAYBE A HALF A BOTTLE OF WINE OR SO.

Q WHEN YOU SAY BEER AND WINE, APPROXIMATELY TWO BOTTLES, MAYBE A HALF A BOTTLE OF WINE, DID YOU EVER MEASURE IT? DID

YOU EVER SAY, "I'M GOING TO LIMIT MYSELF TO 16 OUNCES?" OR ANYTHING OF THAT SORT?

A NO.

Q YOU PRETTY MUCH DRANK?

A JUST DRANK.

Q HAVING A GOOD TIME?

A YES.

Q DID YOU HAVE A WATCH ON THAT NIGHT?

A NO, I DON'T THINK I DID.

Q DID YOU EVER LOOK AT A CLOCK OR TIME WHEN YOU STARTED DRINKING, WHEN YOU STOPPED, ANYTHING OF THAT SORT?

A NO, I DID NOT.

Q THESE ARE APPROXIMATIONS?

A YES.

Q HOW DID YOU FEEL DRINKING BEER AND DRINKING WINE AND SMOKING MARIJUANA?

A WELL. I FELT KIND OF DRUNK, PLUS I HAD HAD THE [573] MARIJUANA EARLIER. AND, YEAH, I WAS KIND OF DRUNK, BUT I MEAN I WASN'T STAGGERING OR I WASN'T WHERE I WAS SLURRED SPEECH OR ANYTHING LIKE THAT.

Q YOU WEREN'T OUT OF CONTROL?

A YES, I WAS NOT OUT OF CONTROL.

Q BUT YOU WERE FEELING DRUNK?

A YES.

Q AFTER VALERIE AND SONJA ARRIVED AND AFTER ALL THE BEER ARRIVED AND TONI WAS THERE, JASON WAS THERE, MANUEL WAS THERE, WHAT IS THE NEXT THING OF SIGNIFICANCE YOU RECALL HAPPENING?

WAS THERE OTHER PEOPLE ARRIVING?

A I BELIEVE SO. I BELIEVE AFTER SOMEONE HAD GONE TO USE THE PHONE AND COME BACK AND THERE WAS SOME OTHER PEOPLE WITH THEM.

Q WHEN YOU SAY "SOMEONE HAD GONE TO USE THE PHONE," DO YOU KNOW WHAT PHONE?

A THE PAY PHONES IN FRONT OF JACK'S MARKET.

Q BACK IN SEPTEMBER OF '95, DO YOU KNOW IF MANUEL HAS A PHONE IN THE HOUSE?

A NO, HE DID NOT.

Q DID HE HAVE A CELL PHONE OR ANY KIND OF PHONE IN THE HOUSE?

A NO, HE DID NOT.

Q WHENEVER YOU NEEDED A PHONE, WERE THERE ANY PHONES YOU WOULD ROUTINELY USE OR CUSTOMARILY USE BACK IN SEPTEMBER OF 1995 WHILE YOU WERE BACK AT MANUEL'S HOUSE?

A YES. EVERYBODY WHO WANTED OR HAD TO USE THE [574] PHONES WOULD HAVE TO USE THE PAY PHONES IN FRONT OF JACK'S MARKET.

Q THAT WAS THE PHONE BANKS PREVIOUSLY DEPICTED IN DEFENSE EXHIBIT "AA"?

A YES.

Q HAD YOU EVER USED THOSE PHONES THERE BEFORE?

A YES, I HAD.

Q ONCE SOMEBODY WENT TO USE THE PHONES, WHAT'S THE NEXT THING YOU REMEMBER?

A MAYBE THEM RETURNING FIVE, TEN MINUTES LATER. AND I BELIEVE -- I DON'T KNOW IF THERE WERE ONE OR TWO OTHER PEOPLE WITH THEM.

Q WHO WAS THE PERSON THAT WENT TO THE PHONES, IF YOU RECALL?

A I BELIEVE IT WAS VALERIE.

Q HOW LONG WAS VALERIE GONE?

A I BELIEVE FIVE, TEN MINUTES.

Q ARE THESE EXACT TIMES?

A APPROXIMATIONS.

Q AND WHEN VALERIE RETURNED, DO YOU KNOW WHO SHE RETURNED WITH?

A I BELIEVE TWO MALES.

Q AND DO YOU RECALL SPECIFICALLY WHO THESE TWO MALES MAY HAVE BEEN?

A I KNEW ONE OF THEM AT THE TIME. ONE WAS DESMOND. AND THE OTHER ONE, I DIDN'T KNOW WHO HE WAS.

Q YOU DIDN'T KNOW HIM AT THAT TIME?

A YES.

[575] Q DID YOU LATER DETERMINE WHO THAT OTHER MALE WAS?

A NO FURTHER THAN MAYBE ONE OF VALERIE'S FRIENDS.

Q DID YOU EVER PUT A NAME TO THAT PERSON?

A NO.

Q SO THIS WAS SOME PERSON THAT CAME TO THE PARTY AND WAS THERE?

A YES.

Q HOW LONG WAS HE THERE?

A PROBABLY THE REST OF THE NIGHT.

Q DID HE EVENTUALLY LEAVE?

A YES. HE LEFT WITH VALERIE AND, I BELIEVE, DESMOND.

Q AND ONCE VALERIE RETURNED, DID YOU, VALERIE, OR ANYONE LEAVE THE PARTY?

A I BELIEVE I HAD LEFT ONCE, ONCE OR TWICE.

Q WHEN YOU LEFT THE PARTY ONCE OR TWICE -- LET'S DEAL WITH THE FIRST TIME. DO YOU KNOW WHERE YOU WENT?

A I BELIEVE I HAD GONE TO THE PHONES BECAUSE I GOTTEN A PAGE, I BELIEVE.

Q AND DO YOU RECALL WHO PAGED YOU?

A NO, I DON'T.

Q HOW LONG DID YOU STAY AT THE PHONES?

A NO MORE THAN FIVE MINUTES.

Q ARE THESE THE PHONES IN FRONT OF JACK'S MARKET?

A YES, THEY ARE.

[576] Q WHAT DID YOU DO AFTER YOU RECEIVED THE PAGE AND WENT TO JACK'S MARKET?

A I JUST CALLED THE PERSON. AND AFTER I FINISHED, I WENT BACK TO THE HOUSE.

Q WHEN YOU WENT TO JACK'S MARKET TO RETURN A PAGE AND MAKE A CALL, DID YOU GO THERE ALONE, OR DID YOU GO THERE WITH OTHER PEOPLE?

A I BELIEVE THE FIRST TIME I WENT ALONE.

Q AND WHEN YOU WENT ALONE, DID YOU TAKE THAT PATH FROM MANUEL'S HOUSE THAT GOES INTO THE REAR OF THE MALL?

A YES, I DID.

Q AND DID YOU GO TO THE REAR OF THE MARKET OR WALK TOWARDS THE FRONT OF THE MARKET?

A THE FRONT OF THE MARKET.

MR. GUTIERREZ: MAY HE STEP DOWN, YOUR HONOR?

THE COURT: YES.

Q SHOW THE LADIES AND GENTLEMEN OF THE JURY MORE OR LESS THE PATH YOU TRAVELED WHEN YOU WOULD GO USE THE PHONES.

A FROM THE REAR OF MANUEL'S HOUSE, THROUGH THE END OF THE ALLEY TO THE ENTRANCE OF THE MALL AND AROUND SIDE -- I BELIEVE THERE'S A CLEANERS RIGHT HERE, THE CLEANER. I WENT IN BETWEEN THE CLEANERS AND KENTUCKY FRIED CHICKEN, AND I WOULD WALK IN FRONT OF THE -- ALL THE STORES, MAYBE FOUR OR

FIVE STORES IN FRONT OF JACK'S MARKET, TO THE PHONE.

Q THE KENTUCKY FRIED CHICKEN, IS THAT THE [577] BUILDING WITH THE RED AROUND IT?

A YES. NEXT TO THE SERVICE CENTER.

Q SO YOU WENT BETWEEN THE KENTUCKY FRIED CHICKEN TO THE BUILDING JUST TO THE WEST OF IT?

A YES.

Q AFTER YOU WERE THERE FOR APPROXIMATELY A FEW MINUTES AND MADE YOUR CALL, WHAT DID YOU DO NEXT?

A WENT BACK TO MANUEL'S HOUSE.

Q WHO WAS THERE, IF YOU RECALL?

A I BELIEVE MANUEL, SONJA, TONI, JASON, AND DESMOND WAS THERE, AND THE OTHER MAN THAT I DIDN'T KNOW HIS NAME.

Q DID ANYONE ELSE ARRIVE AT THE PARTY?

A NO, I DON'T BELIEVE SO.

Q WHAT HAPPENED ONCE YOU RETURNED TO THE PARTY? WHAT WAS GOING ON?

A EVERYBODY WAS PRETTY MUCH HAVING A GOOD TIME LISTENING TO MUSIC, DRINKING, AND EVERYTHING. SOME WOULD GO IN AND OUT OF THE ROOM, WALKING AROUND THE HOUSE, THINGS LIKE THAT.

Q THE PARTY -- WHERE WAS THE PARTY AT? WAS IT IN MORE THAN ONE ROOM?

A NO. IT WAS MOSTLY IN MANUEL'S BEDROOM, BUT SOMETIMES YOU WOULD GO IN THE KITCHEN OR SOMETHING AND TALK.

Q ANY OTHER AREAS OF THE HOUSE?

A NOT THAT I REMEMBER, NO.

Q AND HOW LONG DID THIS PARTY LAST?

A MAYBE A GOOD THREE, FOUR HOURS.

[578] Q AND DURING THIS THREE OR FOUR HOURS THAT PEOPLE WERE HAVING A GOOD TIME PARTYING, WERE PEOPLE DRINKING?

A YES.

Q WERE THEY SMOKING DOPE?

A I BELIEVE THEY WERE.

Q WHAT HAPPENED NEXT AFTER YOU RETURNED FROM THE PHONES?

A I HAD JUST RETURNED TO THE ROOM, AND I CONTINUED DRINKING AND JUST LISTENING TO MUSIC WITH EVERYBODY. AND THEN I BELIEVE A GIRL -- REGINA AND SALINA SHOWED UP. THEY CAME TO THE FRONT OF MANUEL'S HOUSE, I THINK.

Q REGINA AND SALINA, WHEN THEY CAME, DO YOU KNOW HOW THEY GOT THERE?

A NO, I DON'T.

Q THEY SHOWED UP AT THE PARTY?

A YES.

Q DO YOU KNOW ABOUT WHAT TIME IS WAS?

A NO. IT WAS LATE, THOUGH.

Q WHEN YOU SAY THAT REGINA AND SALINA SHOWED UP AND THE PARTY WAS ABOUT THREE HOURS, WAS IT THE BEGINNING OF THE PARTY, THE MIDDLE, OR THE END OF THE PARTY?

A MAYBE CLOSE TO THE END OF THE PARTY.

Q DID REGINA AND SALINA ARRIVE WITH ANYONE OR BY THEMSELVES?

A I BELIEVE JUST THEM TWO.

Q WHAT HAPPENED AFTER THEY ARRIVED AT THE PARTY?

[579] A THEY WERE JUST KIND OF SITTING AROUND BORED. THEY DIDN'T HAVE NO DRINKS. I BELIEVE REGINA -- ONE OF THE TWO HAD GOTTEN PAGED, AND THEN THEY WENT TO THE MARKET TO USE THE PHONES.

Q WHILE YOU WERE THERE THAT NIGHT, YOU NEVER OBSERVED REGINA TO CONSUME ALCOHOL OR DRINKS?

A NO. I NEVER SAW HER DRINKING.

Q WHAT ABOUT SALINA?

A NO. I NEVER SAW HER, EITHER.

Q WHAT ABOUT VALERIE?

A I BELIEVE -- I THINK SHE WAS DRINKING A LITTLE BIT.

Q WHAT ABOUT DESMOND?

A VALERIE -- I THINK SHE WAS DRINKING A LITTLE BIT OF THE WINE.

Q WHAT ABOUT DESMOND?

A YES. HE WAS DRINKING.

Q HOW ABOUT MANUEL?

A YES.

Q WAS DESMOND DRINKING CONTINUOUSLY?

A YES, HE WAS.

Q HOW ABOUT MANUEL?

A YES.

Q AFTER REGINA AND SALINA ARRIVED AT THE PARTY, TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT IS THE NEXT THING THAT YOU REMEMBER HAPPENING.

A I JUST REMEMBER HAPPENING -- ONE OF THEM HAD GOTTEN PAGED, AND THEY WENT TO THE PHONES. AND I BELIEVE [580] THAT WAS THE LAST I SAW OF THEM THAT NIGHT. I BELIEVE THEY STAYED AT THE PHONES OR THEY WERE WAITING FOR A RIDE OR SOMEBODY WAS GOING TO PICK THEM UP OR THEY WERE WAITING FOR SOMEBODY TO COME PICK THEM UP TO GO TO SOMEBODY'S HOUSE.

Q DO YOU EVER REMEMBER REGINA AND SALINA RETURNING TO THE ACTUAL PARTY?

A NO.

Q DID YOU HAVE OCCASION TO LEAVE THE PARTY AFTER REGINA AND SALINA ARRIVED?

A NO, I DON'T BELIEVE I DID. I THINK I STAYED AT THE HOUSE.

Q DID ANY OTHER PEOPLE START COMING TO THE PARTY, OTHER PEOPLE ARRIVED AT THE PARTY?

A NO, I DON'T THINK SO.

Q YOU SAID YOU MAY HAVE USED THE PHONES A SECOND TIME. DO YOU REMEMBER HAVING TO USE THE PHONES A SECOND TIME?

A I THINK I TRIED TO, BUT NO ONE WAS THERE. SOMETHING LIKE THAT.

Q NOW, PRIOR TO SEPTEMBER 23, OR THE LATE NIGHT OF SEPTEMBER 22, DID YOU KNOW THIS MAN IN COURT, PAUL SOTO?

A NO, I DID NOT.

Q DID YOU EVER SEE HIM THERE AT THE PARTY THAT NIGHT?

A YES. I BELIEVE LATER ON. THAT WAS THE ONE WHO AT THAT TIME THE NAME I DID NOT KNOW THAT I BELIEVE CAME WITH DESMOND OR VALERIE.

Q YOU THINK HE ARRIVED WITH DESMOND OR VALERIE?

[581] A YES.

Q DO YOU KNOW ABOUT WHAT TIME PAUL SOTO ARRIVED?

A NO, I DON'T.

Q NOW, AT ANY TIME WHILE YOU WERE AT THE PARTY THAT NIGHT DID YOU EVER SEE A GUN?

A NO, I DID NOT.

Q AT ANY TIME WHILE YOU WERE AT THE PARTY THAT NIGHT WAS THERE EVER ANY DISCUSSIONS ABOUT TAKING SOMEBODY'S CAR?

A NO, THERE WAS NOT.

Q AT ANY TIME WHILE YOU WERE AT THE PARTY THAT NIGHT WAS THERE EVER ANY

DISCUSSION ABOUT TAKING SOMEBODY'S MONEY OR ROBBING THEM?

A NO, THERE WASN'T.

Q NOW, WHAT HAPPENED NEXT TOWARDS THE END OF THE PARTY?

A I BELIEVE SONJA AND TONI HAD TO GET HOME, SO I THINK MANUEL'S UNCLE HAS TAKEN THEM HOME, GIVEN THEM A RIDE HOME.

Q MANUEL'S UNCLE?

A YES.

Q DO YOU KNOW WHAT TIME MANUEL'S UNCLE TOOK SONJA HOME?

A MAYBE 10:00, 10:30. AROUND THERE.

Q WAS MANUEL'S UNCLE AT THE PARTY, ALSO?

A NO. I BELIEVE HE HAD JUST STOPPED BY TO TALK TO MANUEL'S MOTHER, AND MANUEL HAD

CAUGHT HIM AND ASKED HIM FOR A RIDE WHILE HE WAS THERE.

[582] Q DO YOU KNOW ABOUT WHAT TIME IT WAS THAT MANUEL'S UNCLE TOOK SONJA AND HER FRIEND HOME?

SONJA'S FRIEND WAS WHO?

A TONI.

IT WAS MAYBE AROUND 10:00, I THINK, BECAUSE I REMEMBER HER SAYING SHE HAD TO BE HOME BEFORE 10:00 OR 10:30.

Q WHAT HAPPENED AFTER THEY LEFT?

A WELL, WHEN THEY HAD LEFT, MANUEL HAD GONE WITH THEM AND I HAD JUST -- HE ASKED ME TO STAY AT THE PARTY, NOT TO LEAVE, STAY WITH EVERYBODY ELSE THERE. AND SO I HAD JUST STAYED THERE, AND WE CONTINUED LISTENING TO MUSIC. AND SOME WERE STILL DRINKING, I THINK.

Q WAS THIS THROUGHOUT THE HOUSE OR PARTS OF THE HOUSE?

A NO. EVERYBODY STAYED IN MANUEL'S BEDROOM.

Q SO MANUEL ACTUALLY LEFT, ALSO?

A YES.

Q WITH HIS UNCLE?

A YES.

Q HOW LONG WAS MANUEL GONE WITH HIS UNCLE WHEN HE WENT TO TAKE THE YOUNG LADIES HOME?

A I BELIEVE MAYBE 20 MINUTES.

Q AND ANY REASON YOU DIDN'T GO?

A WELL, HE WANTED ME TO STAY THERE WITH THE OTHER PEOPLE IN THE HOUSE AND NOT TO LEAVE THEM THERE ALONE.

Q AND WHILE MANUEL WAS GONE FOR THE 20 MINUTES, DID PEOPLE CONTINUE TO DRINK AND PARTY?

[583] A YES.

Q WAS THERE MUSIC?

A YES, THERE WAS.

Q ANY DANCING?

A NO. I DON'T BELIEVE THERE WAS.

Q HOW WERE YOU FEELING ABOUT THAT TIME?

A WELL, I WAS, I BELIEVE, PRETTY MUCH TO THE END OF MY BEER AND THE WINE, SO I WAS DRUNK.

Q SO WHAT HAPPENED? DID MANUEL EVER RETURN?

A YES, HE DID. HE RETURNED HOME 20 MINUTES LATER; 15, 20 MINUTES LATER.

Q WHAT HAPPENED AFER MANUEL RETURNED FROM LEAVING WITH THE GIRLS AND WITH THE UNCLE?

A WHEN SONJA AND TONI LEFT AND REGINA AND SALINA LEFT, THE PARTY KIND OF STARTED BREAKING DOWN.

Q REGINA AND SALINA, THEY LEFT AFTER TONI AND HER GIRLFRIEND, OR BEFORE?

A I BELIEVE THEY LEFT BEFORE.

Q AND YOU SAID THE PARTY STARTED BREAKING DOWN. ABOUT WHAT TIME WAS THIS THAT THE PARTY WAS BREAKING DOWN?

A MAYBE AROUND 11:00.

Q AND AFTER THE PARTY WAS BREAKING DOWN AROUND 11:00, HOW MANY PEOPLE WERE THERE AFTER REGINA HAD LEFT, SALINA HAD LEFT, TONI AND HER GIRLFRIEND?

A MANUEL HAD RETURNED. I BELIEVE IT WAS ME, MANUEL AND, I THINK, THREE OTHERS.

Q WAS PAUL SOTO THERE?

A YES, HE WAS.

[584] Q WHO ELSE WAS THERE?

A DESMOND AND VALERIE.

Q SO YOU HAD DESMOND, VALERIE, PAUL, MANUEL, AND MIKE THERE?

A YES.

Q THIS WAS TOWARDS THE END OF THE PARTY?

A YES, IT WAS.

Q WHAT HAPPENED AFTER MANUEL RETURNS?

A ME AND MANUEL STAYED AT THE HOUSE, AND I BELIEVE VALERIE HAD TO GO HOME, OR THEY WERE GETTING TIRED OF STAYING OR SOMETHING. SO I BELIEVE THEY LEFT TO USE THE PHONES OR SOMETHING.

Q WHEN YOU SAY "I BELIEVE THEY LEFT," WHO ARE YOU REFERRING TO AS "THEY"?

A IT WAS VALERIE, DESMOND, AND PAUL.

Q AND WHEN VALERIE, DESMOND, AND PAUL LEFT -- YOU SAID TO THE PHONES. WAS THERE ANY REASON THAT YOU BELIEVE THEY WENT TO THE PHONES?

A I THINK MANUEL HAD TOLD ME AFTER THAT THEY HAD LEFT AND THAT THEY WERE GOING TO TRY TO FIND A RIDE HOME OR USE THE PHONES.

Q WHAT DID YOU AND MANUEL DO AFTER EVERYBODY LEFT THE PARTY?

A WE HAD PRETTY MUCH STAYED THERE AND KIND OF ARRANGED HIS ROOM BACK THE WAY EVERYTHING WAS AND CLEANED UP, AND BOTH OF US CHANGED. I CHANGED INTO SOME SHORTS WHICH I WAS GOING TO SLEEP IN OVERNIGHT, AND I BELIEVE MANUEL CHANGED, TOO.

[585] Q NOW, YOU SAID YOU CLEANED UP. WHAT DO YOU MEAN YOU CLEANED UP?

A WELL, CLEANED UP THE TRASH AND THREW AWAY SOME BOTTLES LEFT THERE. CLEANED UP -- AND THERE WAS SOME CIGARETTE BUTTS. AND CLEANED EVERYTHING UP.

Q STRAIGHTENED?

A STRAIGHTENED UP HIS ROOM, YES.

Q YOU SAID YOU CHANGED. WHAT DID YOU CHANGE INTO?

A JUST SOME SHORTS AND -- I HAD HAD A WHITE SHIRT, SO I CHANGED INTO SHORTS.

Q WHY DID YOU CHANGE INTO SHORTS?

A I WAS STAYING THE NIGHT. THOSE ARE KIND OF LIKE MY SLEEPING CLOTHES.

Q WERE YOU PLANNING TO LEAVE AFTER YOU PUT ON THE SHORTS?

A NO. THAT WAS PRETTY MUCH THE NIGHT FOR US.

Q THE PARTY WAS OVER?

A THE LAST PEOPLE HAD LEFT, AND THAT WAS IT.

Q WHEN YOU WERE INTERVIEWED BY DETECTIVE COMSTOCK, DID YOU TELL HER ABOUT CHANGING AND PUTTING ON SHORTS?

A YES, I DID.

Q TELL HER ABOUT CLEANING THE HOUSE?

A YES, I DID.

Q NOW, AFTER YOU CHANGED INTO SHORTS AND AFTER YOU CLEANED THE HOUSE, WHAT HAPPENED?

A I BELIEVE WE HAD FINISHED CLEANING AND MANUEL [586] WANTED TO CALL ONE OF THE GIRLS THAT HE HAD TAKEN HOME THAT MIGHT. WHEN HE DROPPED HER OFF, SHE TOLD HIM TO CALL HER

WHEN HE GOT HOME. SO HE HAD BEEN ASKING ME A FEW TIMES TO GO BACK WITH HIM AND GO USE THE PHONES SO HE COULD CALL THE GIRL.

Q DO YOU KNOW IF MANUEL GOT ANY PAGES, IF YOU RECALL?

A NO. HE DIDN'T HAVE A PAGER I DON'T THINK.

Q NOW, ONCE YOU WERE IN YOUR SHORTS AND DECIDED TO GO BACK TO THE PHONES, YOU AND MANUEL, DID YOU GO IN YOUR SHORTS?

A NO. I FINALLY AGREED TO GO WITH HIM AND GOT DRESSED AGAIN.

Q ABOUT WHAT TIME WAS IT THAT YOU TOOK YOUR SHORTS OFF AND GOT DRESSED AGAIN?

A MAYBE CLOSE TO 12:00, 11:30 OR 12:00.

Q AND ARE THESE BASICALLY ESTIMATES?

A YES.

Q DID YOU LOOK AT A CLOCK OR WATCH?

A NO, I DIDN'T.

Q WHEN YOU HAD BEEN TO THE MALL EARLIER BEFORE YOU PUT ON THE SHORTS TO MAKE PHONE CALLS, DID YOU EVER NOTICE IF THERE WERE ANY POLICE OFFICERS OR POLICE CARS AT THE SUBSTATION?

A YES. WHEN WE HAD LEFT TO GO USE THE PHONE WHEN I WENT WITH MANUEL THERE WAS A LITTLE BLACK-AND-WHITE PATROL CAR, I BELIEVE, IN FRONT OF THE SUBSTATION.

Q WAS THIS BEFORE YOU CHANGED OUT OF YOUR SHORTS [587] OR AFTER?

A THIS WAS AFTER.

Q AFTER YOU CHANGED OUT OF YOUR SHORTS?

A YES.

Q AND WHEN YOU AND MANUEL WENT TO THE PHONES, WHAT PHONES DID YOU GO TO?

A THE PHONES IN FRONT OF JACK'S MARKET.

Q THE PHONES YOU HAD BEEN USING EARLIER THAT EVENING?

A YES.

Q PHONES YOU HAD USED ON PRIOR OCCASIONS?

A YES.

Q WHAT HAPPENED, SIR, WHEN YOU ARRIVED THERE IN FRONT OF JACK'S MARKET?

A WELL, WE HAD STAYED PRETTY MUCH -- I PRETTY MUCH STAYED WITH MANUEL WHILE HE WAS ON THE PHONE, AND I BELIEVE -- I'M NOT SURE, BUT I BELIEVE THAT I WENT INTO THE DONUT SHOP AND THAT I GOT A DONUT. AND I BOUGHT SOME CIGARETTES, I BELIEVE.

Q DID YOU EVER SEE VALERIE WAVE DOWN A CAR OR WAVE DOWN A TRUCK OR ANYTHING OF THAT SORT?

A NO, I DIDN'T.

Q YOU DIDN'T SEE IT?

A NO. I WAS TOLD AFTER THAT.

MR. BERNSTEIN: OBJECTION; HEARSAY.

THE COURT: SUSTAINED.

Q BY MR. GUTIERREZ: YOU SAID, I WAS TOLD AFTERWARDS. DID PEOPLE TALK ABOUT WHAT HAPPENED THAT NIGHT?

[588] A YES, THEY DID.

Q DID THAT INCLUDE MANUEL?

A YES.

Q OTHER PEOPLE?

A YES.

Q PEOPLE WERE TALKING ABOUT WHAT HAPPENED THAT NIGHT?

A YES.

Q EVERYBODY WAS PRETTY UPSET OR NERVOUS OR JUST DISCUSSING IT?

A ACTUALLY. NERVOUS. WE WERE TALKING ABOUT IT.

Q SO BASED ON YOUR PERCEPTION THAT NIGHT, BASED ON WHAT YOU SAW, NOT WHAT YOU HEARD DOWN THE LINE, DID YOU EVER SEE VALERIE WAVE DOWN ANYBODY, ASK ANYBODY FOR MONEY?

A NO, I DID NOT.

Q YOU DON'T RECALL THAT?

A NO.

Q WHAT HAPPENED NEXT?

A WELL, AFTER I GOT TO THE DONUT SHOP -- I BELIEVE I HAD STOPPED FOR FEW SECONDS OR A MINUTE OR TWO AND TALKED TO VALERIE, AND SHE HAD TOLD ME THAT, I BELIEVE, SHE HAD CALLED SOMEBODY OR --

MR. BERNSTEIN: OBJECTION AS HEARSAY.

THE COURT: ANY FURTHER WILL BE.

MR. GUTIERREZ: IT'S NOT OFFERED FOR THE TRUTH OF THE MATTER.

THE COURT: SUSTAINED.

Q BY MR. GUTIERREZ: WAS THERE -- WE REALLY [589] CAN'T GO INTO THE CONTENTS OF WHAT PEOPLE ARE SAYING. IT'S HEARSAY. SO RATHER THAN WHAT PEOPLE TOLD YOU -- DID YOU HAVE A CONVERSATION WITH VALERIE?

A YES, I DID.

Q HOW LONG WAS THIS CONVERSATION WITH VALERIE?

A MAYBE JUST A COUPLE MINUTES.

Q WERE THERE OTHER PEOPLE CONVERSING IN THE AREA?

A I BELIEVE SO.

Q AND WHERE WERE THEY CONVERSING?

A IN THE SAME AREA, I BELIEVE, NOT TOO FAR.

Q WHEN YOU SAY "NOT TOO FAR," WHERE WOULD THAT HAVE BEEN?

A I BELIEVE THEY WERE BY THE PLANTERS.

Q DID YOU EVER SEE OTHER CARS COME UP AND DRIVE AND PEOPLE TALK TO PEOPLE IN CARS OR ANYTHING OF THAT SORT?

A NO, I DID NOT.

Q HOW LONG -- THERE WAS A SHOOTING THERE THAT NIGHT?

A I BELIEVE THERE WAS, YES.

Q YOU BELIEVE THERE WAS, OR YOU KNOW THERE WAS?

A YES, THERE WAS.

Q HOW LONG HAD YOU BEEN THERE AT THE PHONES TO THE TIME THE SHOT WAS FIRED?

MS. NAKAKI: OBJECTION, YOUR HONOR. THAT'S NOT WHAT THIS WITNESS HAS TESTIFIED TO ABOUT BEING AT THE PHONES AT THAT TIME.

THE COURT: OVERRULED.

[590] MR. GUTIERREZ: THANK YOU, YOUR HONOR.

Q HOW LONG -- YOU INDICATED -- JUST SO IT'S CLEAR, YOU INDICATED THAT YOU AND MANUEL DECIDED TO CHANGE, PUT YOUR CLOTHES BACK ON, GO TO THE PHONE STALLS?

A YES.

Q AT SOME TIME YOU ARRIVED AT THE PHONES HERE THAT ARE IN FRONT OF JACK'S MARKET, CORRECT?

A YES.

Q LATER THAT EVENING THERE WAS A SHOOTING BY THE DUMPSTER IN FRONT OF THE DONUT STORE?

A YES.

Q WHAT WAS THE SPAN OF TIME, MORE OR LESS, BETWEEN THE TIME THAT YOU FIRST ARRIVED

AT THE PHONE BANKS THERE IN FRONT OF JACK'S MARKET AND THE SHOOTING?

A MAYBE TEN MINUTES; FIVE, TEN MINUTES.

Q RATHER QUICKLY?

A YES.

Q NOW, WITHOUT TELLING ME WHAT VALERIE WAS TELLING YOU, WAS THERE EVER ANY CONVERSATION ABOUT A RIDE OR ANYTHING OF THAT SORT?

A NO, I DON'T THINK THERE WAS.

Q AND IN ADDITION TO CONVERSING WITH VALERIE, DID YOU CONVERSE WITH OTHER PEOPLE?

A NO, I DID NOT.

Q DO YOU KNOW WHERE MANUEL WAS THROUGHOUT THOSE FIVE TO TEN MINUTES?

A I BELIEVE HE WAS ON THE PHONE.

Q WERE YOU PAYING ATTENTION TO MANUEL?

[591] A NO, I WAS NOT.

Q WERE YOU PAYING ATTENTION TO ANY OF THE OTHER PEOPLE THAT WERE THERE?

A NO, I WAS NOT.

Q WERE YOU PAYING ATTENTION TO DESMOND?

A NO, I WAS NOT.

Q WHO ELSE WAS THERE BESIDES VALERIE WHEN YOU ARRIVED?

A I BELIEVE DESMOND AND PAUL.

Q WHERE WAS VALERIE WHEN YOU HAD THIS CONVERSATION WITH HER?

A OUT ON THE SIDEWALK, MAYBE CLOSE TO BEING IN BETWEEN THE PLANTER THAT SEPARATES JACK'S MARKET AND THE DONUT SHOP.

Q AND YOU SAY "THE SIDEWALK." WOULD THAT BE THE SIDEWALK IN FRONT O F THE PLANTER AREA?

A YES.

Q AND DO YOU KNOW WHERE MANUEL WAS WHEN YOU WERE KIND OF TALKING TO VALERIE?

A NO, I DO NOT.

Q WHAT ABOUT PAUL?

A NO. I DON'T KNOW WHERE HE WAS AT.

Q WHAT ABOUT DESMOND?

A NO.

Q DID YOU EVER GO TO ANY OTHER AREAS OTHER THAN AROUND THE DONUT SHOP, AROUND THE PHONE BANKS, OR IN FRONT OF THE PLANTER, THE SIDEWALK AREA?

A YES. I KIND OF GONE OFF ON MY OWN WANDERING [592] AROUND THE MALL.

Q AND WHAT HAPPENED NEXT?

A I BELIEVE -- I'M NOT REALLY SURE. CAN YOU ASK ME THE QUESTION AGAIN?

Q YOU SAID YOU WERE WALKING AROUND THE AREA. WHAT AREAS WERE YOU WALKING AROUND?

A I HAD WALKED BY A FAST FOOD RESTAURANT CALLED THE GREEN BURRITO. AND IN BETWEEN THE GREEN BURRITO AND THE CLOTHING STORE THERE'S CHAIRS THERE, LIKE FOR PEOPLE TO GO OUT AND EAT. THERE'S -- DURING THE LUNCH BREAK I HAD WANDERED BY THERE. I HAD GONE OUT, I BELIEVE, BACK IN FRONT OF THE YOSHINOYA RESTAURANT.

Q DID YOU NOTICE ANY VEHICLES OR TRUCKS OR ANYTHING LIKE THAT?

A I BELIEVE IT WAS A TRUCK IN FRONT OF THE DUMPSTER.

Q WHAT KIND OF TRUCK?

A IT LOOKED KIND OF LIKE JUST A WHITE OLD TRUCK.

Q WHAT ABOUT DELIVERY TRUCKS?

A I THINK LATER A DELIVER TRUCK PULLED UP IN THE PARKING LOT.

Q WHEN YOU SAY "A DELIVERY TRUCK," WHAT ARE YOU REFERRING TO?

A LIKE IT WAS A BIG -- LIKE A DIESEL TRUCK. IT WAS REAL BIG, LIKE THE ONES THAT CARRY THINGS AROUND AND THINGS LIKE THAT.

Q WHERE WAS THE DIESEL LOCATED?

A I BELIEVE JUST BEHIND THE DUMPSTER. WHEN IT [593] HAD FINALLY COME TO A STOP, I BELIEVE BEHIND THE DUMPSTER. I'M NOT SURE.

Q THIS DIESEL TRUCK THAT WAS THERE SOMEWHERE BEHIND THE DUMPSTER -- WHEN YOU SAY "BEHIND THE DUMPSTER," WOULD IT HAVE BEEN TO THE LEFT OF PEOPLE'S A-1, OR WOULD IT HAVE BEEN TO THE RIGHT OF PEOPLE'S A-1?

A TO THE RIGHT.

Q TO THE RIGHT?

A YES.

Q TOWARDS THE END?

A YES.

Q NOW, THE GREEN BURRITO, IS THAT SOMEWHERE IN THIS AREA?

A THE GREEN BURRITO, I BELIEVE IN PEOPLE'S "A," IS ON THE -- IT'S THE BUILDING ON THE TOP RIGHT CORNER. LOOKS LIKE THERE'S, I BELIEVE, RED WRITING ON IT.

Q AND WHILE YOU WERE THERE, DID YOU EVER WALK OVER TO THE WHITE TRUCK THAT'S DEPICTED ON DOUBLE "E"?

A I HAD NEVER WALKED TO THE TRUCK, BUT I WALKED BY THE YOSHINOYA RESTAURANT IN THAT DIRECTION.

Q WHAT HAPPENED AS YOU WALKED UP THERE?

A I DON'T REMEMBER SEEING WHAT ANYBODY HAD DONE OR WHERE EVERYTHING ELSE WAS. BUT WHEN I HAD WALKED OVER THERE -- I WAS MAYBE STANDING IN BETWEEN THE TRUCK AND THE RESTAURANT FOR MAYBE 15, 20 SECONDS, MAYBE CLOSE TO HALF A MINUTE, AND I HEARD WHAT SOUNDED LIKE A GUNSHOT.

Q WHERE WERE YOU STANDING WHEN YOU HEARD THIS GUNSHOT?

[594] A MAYBE ABOUT FIVE, SIX -- MAYBE ABOUT SIX, SEVEN FEET FROM THE TRUCK.

Q IN WHAT DIRECTION WERE YOU FROM THE TRUCK? WERE YOU TOWARDS THE FRONT? THE REAR?

A I WAS TOWARDS THE REAR, I BELIEVE.

Q I WANT YOU TO STAND UP AND POINT TO THE APPROXIMATE AREA YOU WERE STANDING WHEN YOU HEARD THE SHOT.

A I WAS MAYBE STANDING RIGHT HERE (INDICATING).

Q NOW, WHAT IS DIRECTLY TO THE RIGHT OF DOUBLE "E"?

A TO THE RIGHT OVER HERE WOULD BE -- THERE'S A SIDEWALK. AND THEN THAT GOES TO -- THERE'S A DOOR TO THE YOSHINOYA RESTAURANT.

Q THE YOSHINOYA RESTAURANT, DO YOU SEE THAT IN PEOPLE'S A-1?

A YES, I DO.

Q WHERE IS THAT?

A IT'S THE ROOF TOP ABOUT IN THE CENTER OF THE PICTURE.

Q WHERE WAS THE TRUCK DEPICTED IN DEFENSE DOUBLE "E" LOCATED IN PEOPLE'S A-1?

A IT WAS, I BELIEVE, DIRECTLY IN BETWEEN THE YOSHINOYA RESTAURANT AND THE DUMPSTER.

Q BETWEEN YOSHINOYA RESTAURANT AND THE DUMPSTER IS THERE A DRIVEWAY?

A YES.

Q AND IS THERE A DRIVEWAY FOR CARS TO GO IN OPPOSITE DIRECTIONS?

[595] A YES. GO BOTH WAYS.

Q HOW MANY LANES?

A TWO.

Q TWO LANES?

A YES.

Q ONE LANE FOR WHICH WAY?

A ONE LANE FOR EAST AND ONE LANE FOR WEST.

Q AND YOU POINTED TO DOUBLE "E." I WANT YOU TO LOOK AT PEOPLE'S I-C AND SHOW THE LADIES AND GENTLEMEN OF THE JURY APPROXIMATELY WHERE YOU WERE STANDING AND YOU HEARD THE SHOT.

A I WAS APPROXIMATELY STANDING ABOUT RIGHT HERE (INDICATING).

Q AND HOW FAR DO YOU THINK YOU WERE FROM THE TRUCK WHEN YOU HEARD THE SHOT?

A MAYBE, I BELIEVE, ABOUT SIX, SEVEN FEET.

Q CAN YOU POINT TO SOMETHING IN THIS COURTROOM SO THAT THE LADIES AND GENTLEMEN OF THE JURY CAN VISUALIZE HOW FAR YOU WERE FROM THE TRUCK WHEN YOU HEARD THAT SHOOT?

A MAYBE TO THE -- FROM ME TO THE TRUCK WAS MAYBE AT THE THIRD CHAIR FROM THE FRONT.

Q APPROXIMATELY HERE?

A NO. LIKE MAYBE THE NEXT CHAIR.

THE COURT: APPROXIMATELY NINE FEET.

Q BY MR. GUTIERREZ: NOW, YOU POINTED ON THE DIAGRAM OF PEOPLE'S 1 TO THE RIGHT OF THE PHOTOGRAPH; IS THAT CORRECT?

A YES.

[596] Q WOULD IT HAVE BEEN TO THE RIGHT OF THE TIRE OR RIGHT OF THE REAR OF THE CAR?

A YOU MEAN --

Q TO THE RIGHT OF THE PASSENGER SIDE OF THE VEHICLE?

A YES.

Q OKAY. DID YOU EVER APPROACH THE DRIVER'S SIDE OF THE VEHICLE?

A NO, I DID NOT.

Q DID YOU EVER WITH YOUR HANDS TOUCH THE VEHICLE IN PEOPLE'S EXHIBIT 1-C? DID YOU EVER TOUCH THAT MAN'S PROPERTY, HIS CAR?

A NO, I DID NOT.

Q DID YOU EVER PUT YOUR FINGERS OR ANYTHING IN HIS CAR?

A NO, I DID NOT.

Q ON ANY PORTION OF HIS CAR?

A NO.

Q DID YOU EVER HAVE A CONVERSATION WITH A MAN BY THIS TRUCK BEFORE A SHOT WAS FIRED?

A NO.

Q DID YOU EVER DEMAND ANYTHING FROM HIM?

A NO, I DID NOT.

Q DID YOU EVER MAKE ANY MENACING GESTURES TO HIM OR ANYTHING OF THAT SORT?

A NO.

Q YOU CAN RESUME YOUR SEAT.

MICHAEL, DID YOU NEED A RIDE HOME THAT NIGHT?

[597] A NO, I DID NOT. I PLANNED TO SPEND THE NIGHT AT MANUEL'S HOUSE.

Q DID YOU WANT THAT MAN'S CAR?

A NO, I DID NOT.

Q DID YOU WANT THAT MAN'S MONEY?

A NO, I DID NOT.

Q DID YOU NEED THAT MAN'S MONEY?

A NO. I HAD A JOB AT THE TIME. I HAD MY OWN MONEY.

Q DID YOU WANT THAT MAN TO GET KILLED?

A NO, I DID NOT.

Q DID YOU EVER SUGGEST OR HELP ANYONE -- DID YOU EVER HELP SOMEBODY --

MS. NAKAKI: YOUR HONOR, OBJECT. LEADING QUESTIONS.

THE COURT: SUSTAINED.

MR. GUTIERREZ: MAY WE APPROACH?

THE COURT: YES, YOU MAY.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR.)

MR. GUTIERREZ: CAN I ASK HIM IF HE HELPED MR. SOTO IN ANY WAY TO GO OVER THERE?

THE COURT: NOT UNLESS HE'S VOLUNTEERING THE INFORMATION. THE NATURE OF YOUR QUESTION SUGGESTS THE ANSWER.

MR. GUTIERREZ: I'M SORRY. DIRECT IS NOT MY -- CAN I ASK HIM IF HE EVER SAID ANYTHING TO CAUSE --

[598] THE COURT: YOU CAN ASK HIM WHAT, IF ANYTHING, HE SAID.

MR. GUTIERREZ: CAN I ASK HIM IF HE SAID ANYTHING TO PAUL TO GO THERE?

THE COURT: NO. THAT SUGGESTS THE ANSWER.

MR. GUTIERREZ: OKAY.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

Q BY MR. GUTIERREZ: ONE LAST QUESTION, MICHAEL -- EXCUSE ME -- MR. ALVARADO. WAS IT EVER IN ANY WAY YOUR INTENTION FOR THAT INCIDENT TO OCCUR THAT NIGHT?

A NO, IT WASN'T. I NEVER HAD ANY INTENTION.

MR. GUTIERREZ: THANK YOU, MR. ALVARADO.

THE COURT: ALL RIGHT.

MR. BERNSTEIN: NO QUESTIONS.

THE COURT: MS. NAKAKI.

+CROSS-EXAMINATION

BY MS. NAKAKI:

Q GOOD MORNING, MR. ALVARADO.

A MORNING.

Q WE HAVE NEVER SPOKEN BEFORE?

A NO, WE HAVEN'T.

Q YOUR ATTORNEY ASKED YOU A LITTLE ABOUT AN INTERVIEW THAT YOU HAD WITH DETECTIVE COMSTOCK. THIS IS THE WOMAN SITTING HERE IN COURT TODAY?

[599] A YES.

Q AT THAT INTERVIEW, IT WAS JUST YOU AND HER, CORRECT?

A YES.

Q IT WAS IN AN INTERVIEW ROOM?

A YES, IT WAS.

Q AT NO TIME WERE ANY WEAPONS POINTED AT YOU, ANYTHING OF THAT SORT?

A NO.

Q THIS WAS BASICALLY A LOW-KEY CONVERSATION, CORRECT?

A YES, IT WAS.

Q SHE WOULD ASK YOU SOME QUESTIONS, CORRECT?

A YES.

Q AND YOU WOULD ANSWER THOSE QUESTIONS, CORRECT?

A YES.

Q IN NO WAY WERE YOU THREATENED BY DETECTIVE COMSTOCK?

A NO.

Q IN TERMS OF ANY THREAT OF PHYSICAL VIOLENCE, THAT TYPE OF THING?

A NO.

Q SO IT WAS A PRETTY FRIENDLY CONVERSATION; IS THAT FAIR TO SAY?

A YES.

Q AND THERE WAS NO ONE ELSE PRESENT IN TERMS OF OTHER LAW ENFORCEMENT, UNIFORMED OFFICERS INSIDE THAT INTERVIEW ROOM?

[600] A NO, THERE WASN'T.

Q I THINK, AS STATED BEFORE, IT WAS ALL VOLUNTARY ON YOUR PART?

A YES.

Q AT NO TIME DID YOU FEEL COERCED?

A I DON'T UNDERSTAND THAT WORD.

Q IN OTHER WORDS, YOU WEREN'T THREATENED?

A RIGHT.

Q IT WAS A FRIENDLY CONVERSATION?

A YES.

A YES.

Q COERCED, FORCED -- DID YOU FEEL COERCED OR THREATENED IN ANY WAY?

A NO, I DID NOT.

Q IN OTHER WORDS, IT WAS SORT OF A FREE FLOW BETWEEN YOURSELF AND DETECTIVE COMSTOCK?

A YES.

Q THERE WAS MENTION OF AN INDIVIDUAL BY THE NAME OF MANUEL RIVERA. YOU KNOW MANUEL, CORRECT?

A YES.

Q HE'S A FRIEND OF YOURS, CORRECT?

A YES.

Q DURING THIS INTERVIEW YOU HAD WITH DETECTIVE COMSTOCK OCTOBER 24, 1995, THERE WERE SOME QUESTIONS ABOUT MR. RIVERA, CORRECT?

A YES, I BELIEVE THERE WAS.

Q HE, AT SOME POINT IN THE EVENING OF SEPTEMBER 22 AND 23 OF 1995, WAS PRESENT AT THE PARTY, CORRECT?

A YES.

[601] Q AND HE HAD ABSOLUTELY NOTHING TO DO WITH THE INCIDENT THAT OCCURRED AT THE

SHOPPING CENTER THAT YOU SPOKE ABOUT ON SEPTEMBER 23, 1995?

A RIGHT.

Q IN FACT, YOU TOLD DETECTIVE COMSTOCK AT NO TIME WAS MANUEL EVER UP AT THE TRUCK?

A CORRECT.

Q NOW, YOU WERE ASKED ABOUT THE LAYOUT OF THE SHOPPING CENTER, AND YOU ARE FAMILIAR WITH IT. AND YOU WERE ASKED ABOUT, IN PARTICULAR, PEOPLE'S 1-B, CORRECT?

A YES.

Q AND AT ONE POINT YOU INDICATED -- AND I'M POINTING TO THE BUILDING THAT APPEARS TO BE ON THE MOST RIGHT-HAND PORTION OF THIS MALL AREA. YOU SAID THAT'S THE POLICE SERVICE CENTER?

A YES, IT IS.

Q YOU DID SEE A PATROL CAR OUT FRONT?

A YES, I DID.

Q AND THE MOTOR WAS RUNNING?

A YES.

Q YOU DON'T KNOW IF THE VEHICLE WAS ON ITS WAY OUT OR COMING IN?

A NO. I COULDN'T TELL.

Q YOU INDICATED -- AND I'M POINTING TO A SEPARATE BUILDING. IT'S APART FROM THIS MAIN MALL AREA. I THINK YOU STATED THIS WAS THE YOSHINOYA RESTAURANT; IS THAT CORRECT?

A YES.

[602] Q SO THE LOCATION OF WHERE THE DUMPSTER AND THIS TRUCK WOULD BE WOULD BE SOMEWHERE ON THIS SIDE -- AND I'M AGAIN POINTING BY THE YOSHINOYA RESTAURANT; IS THAT CORRECT?

A YES.

Q FROM WHAT YOU'RE TELLING US WHERE THE PATROL CAR WOULD HAVE BEEN AT THIS BUILDING AND WHERE THE YOSHINOYA RESTAURANT IS ON PEOPLE'S 1-B, THERE'S NO WAY A PATROL CAR COULD SEE WHAT IS GOING ON BY THE YOSHINOYA RESTAURANT; IS THAT CORRECT?

A YES.

Q IN OTHER WORDS, THERE'S NO STRAIGHT LINE OF VISION FOR THAT PATROL CAR TO SEE ANYTHING HAPPENING ON THAT SIDE WHERE THIS TRUCK AND DUMPSTER ARE, CORRECT?

A YES.

Q NOW, YOU WERE ASKED ABOUT SOME DRINKING THAT WENT ON ON SEPTEMBER 22 AND INTO SEPTEMBER 23 OF 1995, CORRECT?

A YES.

Q ON THAT EVENING YOU WERE NOT DRUNK, CORRECT?

A WELL, I WAS DRUNK, BUT I WAS NOT TO THE POINT WHERE I WAS STUMBLING OR I HAD SLURRED SPEECH.

Q I'LL GO BACK TO THE INTERVIEW YOU HAD WITH DETECTIVE COMSTOCK BACK IN OCTOBER. YOU DO REMEMBER BEING ASKED SOME QUESTIONS ABOUT DRINKING AND WHATNOT, CORRECT?

A YES.

Q AND DO YOU REMEMBER BEING ASKED, HOW MUCH DID YOU DRINK --

MS. NAKAKI: AND FOR THE RECORD, PAGE 228, LINE 11.

[603] Q "HOW MUCH DID YOU HAVE TO DRINK?

"A A LITTLE 40.

"Q A LITTLE 40?

"A A LITTLE 40 AND THEN SOME OF THE STRAWBERRY HILL.

"Q WERE YOU A LITTLE BUZZED?

"A A LITTLE BIT."

MR. GUTIERREZ: I WOULD ASK THAT IT GO ON TO --

THE COURT: YOU'LL HAVE THE OPPORTUNITY.

Q BY MS. NAKAKI: YOU SAID YOU WERE A LITTLE BIT BUZZED, CORRECT?

A YES.

Q AND BY THAT, YOU MEAN YOU WERE FEELING THE EFFECTS OF THE ALCOHOL, CORRECT?

A YES, I WAS.

Q HOWEVER, YOU STILL HAD YOUR WITS ABOUT YOU?

A PRETTY MUCH, YES.

Q YOU COULD WALK, CORRECT?

A YES.

Q YOU COULD TALK?

A YES.

Q YOU COULD CARRY ON A CONVERSATION, CORRECT?

A YES.

Q BECAUSE AT SOME POINT IN THAT EVENING YOU WERE WALKING BACK AND FORTH BETWEEN MANUEL'S HOUSE AND THE SHOPPING CENTER, CORRECT?

A YES.

Q SO WHEN YOU USED THE TERM "A LITTLE BUZZED," [604] YOU'RE SAYING YOU'RE STILL ABLE TO COMPREHEND THINGS, CORRECT?

A YES. I TOLD YOU THAT I WAS ABLE TO WALK, THAT I DID NOT HAVE SLURRED SPEECH.

Q YOU UNDERSTOOD WHAT PEOPLE WERE SAYING TO YOU?

A YES.

Q YOU COULD COMPREHEND THAT, CORRECT?

A YES.

Q AND THAT WAS YOUR STATE THAT EVENING, "A LITTLE BUZZED," CORRECT?

A YES.

Q NOW, YOU HAD ALSO MENTIONED AT SOME POINT THERE WAS THIS BACK AND FORTH TO THE PAY PHONES; IS THAT RIGHT?

A YES.

Q AND YOU WENT WITH MR. RIVERA, YOUR FRIEND?

A ONCE, I BELIEVE.

Q WAS THAT THE FIRST OR SECOND TIME?

A WELL, THE LAST TIME WHEN HE USED THE PHONE.

Q GETTING BACK TO YOUR INTERVIEW WITH DETECTIVE COMSTOCK, THERE WAS SOME DISCUSSION BETWEEN YOU AND THE DETECTIVE ABOUT WHAT HAPPENED OUT AT THE SHOPPING CENTER?

A YES.

Q IN FACT, A MAN WAS KILLED THAT NIGHT?

A YES.

Q AND YOU WERE AWARE OF THAT, CORRECT?

A YES.

[605] BY MS. NAKAKI: YOUR HONOR, I'LL BE APPROACHING THE WITNESS WITH PEOPLE'S 8, WHICH IS THE TAPE.

THE COURT: ALL RIGHT.

Q BY MS. NAKAKI: AND DURING YOUR INTERVIEW ON OCTOBER 24, 1995, WITH DETECTIVE COMSTOCK, YOU EXPLAINED TO HER YOUR RECOLLECTION, YOUR OBSERVATIONS OF WHAT HAPPENED THAT NIGHT WHEN A MAN WAS KILLED OUT THERE AT THE SHOPPING CENTER, CORRECT?

A YES.

Q FOR THE RECORD, YOU INDICATED THERE WAS SOMEONE, YOU WEREN'T SURE WHO IT WAS, THAT WAS ALSO AT THAT PARTY.

IS THIS PERSON IN THE COURTROOM TODAY?

A YES, THEY ARE.

Q POINT HIM OUT AND DESCRIBE WHAT HE'S WEARING IN THE COURTROOM TODAY.

A HE IS SEATED AT THE DEFENSE TABLE WEARING A BUTTON SHIRT, CHECKERED.

THE COURT: INDICATING MR. SOTO, FOR THE RECORD.

Q BY MS. NAKAKI: THE MAN YOU IDENTIFIED IN COURT, PAUL SOTO, HE WAS AT THE PARTY THAT NIGHT?

A YES.

Q AS A MATTER OF FACT, YOU KNEW HIS NAME WAS PAUL, CORRECT?

A NO, NOT AT THE NIGHT OF THE PARTY.

Q DO YOU REMEMBER HAVING A CONVERSATION WITH DETECTIVE COMSTOCK ABOUT THIS UNKNOWN MALE AND THEN YOU LATER VOLUNTEERED THE NAME TO BE PAUL?

[606] A YES. BECAUSE I HAD FOUND OUT FROM OTHER PEOPLE THAT THAT WAS HIS NAME.

Q INITIALLY, YOU TOLD DETECTIVE COMSTOCK YOU DID NOT KNOW THE PERSON'S NAME, THIS IS ON OCTOBER 24, 1995, AND HE WAS REFERRED TO AS THE UNKNOWN MALE, CORRECT?

A YES.

Q WITHOUT ANY INFORMATION BEING GIVEN TO YOU BY DETECTIVE COMSTOCK, YOU VOLUNTEERED THE NAME AS BEING PAUL, CORRECT?

A YES.

Q SO CONTRARY TO WHAT YOU INITIALLY TOLD DETECTIVE COMSTOCK ON OCTOBER 24, 1995,

YOU KNEW THE UNKNOWN MALE'S NAME WAS PAUL ON OCTOBER 24, 1995, CORRECT?

A YES.

Q IT WAS ONLY AFTER DETECTIVE COMSTOCK POINTED OUT TO YOU, "OH, BY THE WAY, YOU MENTIONED THE NAME PAUL," THAT YOU ADMITTED YOU KNEW THE UNKNOWN MALE'S NAME WAS PAUL, CORRECT?

A YES.

Q AS A MATTER OF FACT, YOU ALSO ADMITTED TO DETECTIVE COMSTOCK THAT CONTRARY TO JUST MEETING HIM AT THE PARTY, YOU ACTUALLY MET PAUL EARLIER THAT DAY, CORRECT?

A NO. I DON'T REMEMBER EVER MEETING HIM THAT DAY.

MS. NAKAKI: IF I MAY JUST HAVE A MOMENT, YOUR HONOR.

YOUR HONOR, I'LL BE APPROACHING THE WITNESS WITH PAGE 233, BEGINNING AT LINE 16.

Q WHAT I WOULD LIKE YOU TO DO IS GO AHEAD AND [607] READ PAGE 233, LINE 16 DOWN TO LINE 27.

A (WITNESS COMPLIES.)

MR. GUTIERREZ: I'M SORRY, COUNSEL. WHAT PAGE?

MS. NAKAKI: PAGE 233, BEGINNING AT LINE 16.

MR. BERNSTEIN: ENDING WHERE?

MS. NAKAKI: 27.

MR. BERNSTEIN: YOUR HONOR, I'LL HAVE AN OBJECTION.

THE COURT: BASED ON? I DON'T HAVE IT, SO --

MR. BERNSTEIN: MAY WE APPROACH? I WOULD LIKE TO MAKE A RECORD.

THE COURT: YES, YOU MAY.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR.)

MR. BERNSTEIN: 13 TO 27?

MS. NAKAKI: LINE 16 TO 27.

THE COURT: BEFORE YOU TWO START, LET ME READ BECAUSE IT'S EXCISED ON MY VERSION.

MS. NAKAKI: LINE 16 THROUGH 27.

THE COURT: HOW CAN YOU GET THIS IN?

MS. NAKAKI: THE POINT THAT THE PEOPLE ARE ATTEMPTING TO MAKE IS ON DIRECT MR. ALVARADO CLAIMS THE FIRST TIME THAT HE EVER MET MR. SOTO WAS AT THE PARTY, CONTRARY TO WHAT HE STATED ON DIRECT. HE IS SAYING, NO, I ACTUALLY SEEN HIM EARLIER IN THE DAY AT THE PARK.

THE COURT: IF YOU CAN LIMIT IT TO THAT, THAT'S FINE. BUT NO REFERENCE TO ANY GANG.

[608] MS. NAKAKI: NO.

MR. GUTIERREZ: "I HAD KIND OF PUT TWO AND TWO TOGETHER WHEN WE WERE AT A PARK THAT DAY. THERE WAS HIM, ANOTHER GUY FROM RIVERA."

THE REAL PROBLEM IS THE GANG STUFF.

MS. NAKAKI: HAVE YOU ADVISED YOUR CLIENT -- HE WAS SITTING HERE IN COURT -- HOW NONE OF THAT IS SUPPOSED TO COME IN? DO YOU WANT TO CONFER WITH HIM BRIEFLY?

MR. GUTIERREZ: NO. YOU CAN LEAD HIM ON IT. HE'S NOT A SOPHISTICATED GUY.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

Q BY MS. NAKAKI: MR. ALVARADO, DID YOU HAVE A CHANCE TO READ LINE 16 THROUGH 27 OF THIS PAGE?

A YES, I DID.

Q AND AS A MATTER OF FACT, YOU DID TELL THE DETECTIVE THAT YOU HAD MET MR. PAUL SOTO EARLIER THAT DAY, CORRECT?

A I HAD NEVER MET HIM, BUT I SEEN HIM.

Q YOU HAD ACTUALLY SEEN HIM EARLIER IN THE DAY?

A YES.

Q THE PARTY WAS NOT THE FIRST TIME YOU HAD SEEN HIM?

A BUT I NEVER KNEW THAT WAS THE SAME MALE UNTIL I WAS TOLD AFTERWARDS.

MR. BERNSTEIN: OBJECT TO ANYTHING HE'S TOLD.

[609] THE COURT: OBJECTION IS PREMATURE.

MR. GUTIERREZ: I ASK HE BE PERMITTED TO A FULL RESPONSE.

THE COURT: GO ON FROM HERE.

Q BY MS. NAKAKI: NOW, DO YOU RECALL TELLING THE DETECTIVE THAT YOU PUT TWO AND TWO TOGETHER, THAT YOU HAD DETERMINED THAT YOU HAD ACTUALLY SEEN PAUL SOTO EARLIER THAT DAY AND NOT JUST AT THE PARTY? IS THAT WHAT YOU TOLD THE DETECTIVE?

A YES.

Q AND DURING YOUR INTERVIEW WITH DETECTIVE COMSTOCK, YOU EXPLAINED TO HER THE CIRCUMSTANCES OF THE KILLING OF THE MAN, MR. CASTANEDA, AT THE SHOPPING CENTER ON SEPTEMBER 23, 1995, CORRECT?

A YES.

Q AND AS A MATTER OF FACT, YOU TOLD HER THAT PAUL WAS GOING TO GO UP AND TRY TO JACK THE GUY, TAKE HIS TRUCK, CORRECT?

A YES. BUT THESE WERE FROM WHAT I WAS TOLD AFTERWARDS --

Q THAT'S NOT WHAT YOU TOLD --

A -- ABOUT WHAT HAD HAPPENED.

MS. NAKAKI: YOUR HONOR, IF I MAY, I'LL BE PLAYING PEOPLE'S 8.

THE COURT: WHAT PORTION?

MS. NAKAKI: BEGINNING PAGE 232.

MR. BERNSTEIN: YOUR HONOR, I'LL OBJECT. IT'S BEEN PLAYED ONCE.

[610] THE COURT: NOTED FOR THE RECORD.

(WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

Q BY MS. NAKAKI: AT THAT POINT, YOU VOLUNTEERED THE NAME PAUL?

A YES.

Q BUT AT THE TIME OF THE INTERVIEW ON OCTOBER 24, 1995, YOU KNEW HIS NAME WAS PAUL?

A YES.

Q YOU TOLD THE DETECTIVE YOU DIDN'T KNOW WHAT HIS NAME WAS, CORRECT?

A YES.

Q AND AFTER SHE POINTED OUT TO YOU THAT YOU VOLUNTEERED THE NAME PAUL WAS WHEN YOU ADMITTED YOU DID KNOW WHAT THE UNKNOWN MALE'S NAME WAS, CORRECT?

A YES.

Q NOW, YOU ADMITTED ALSO -- YOU HEARD THE TAPE. IS THAT YOUR VOICE?

A YES, IT IS.

Q AND THAT WAS THE INTERVIEW THAT YOU HAD WITH DETECTIVE COMSTOCK, OR PART OF IT, ON OCTOBER 24, 1995?

A YES.

Q AND AT THAT TIME, YOU SAID THAT PAUL WANTED THE MAN'S TRUCK, CORRECT?

A YES.

Q YOU DIDN'T KNOW WHAT YOU WERE THINKING, BUT [611] YOU WENT OVER THERE. AND YOU HAD NO INTENTION OF HURTING HIM, BUT YOU WALKED OVER TO THE SIDE OF THE TRUCK ALSO, CORRECT?

A YES.

Q YOU WALKED OVER TO THE SIDE OF TRUCK BECAUSE YOU KNEW PAUL WAS GOING TO ROB AND TAKE THE MAN'S TRUCK, CORRECT?

A NO, I DID NOT.

Q YOU JUST WALKED UP TO THE TRUCK?

A I WASN'T WALKING TOWARDS THE TRUCK. I WAS WALKING BETWEEN THE TRUCK AND THE RESTAURANT. I HAD NO INTENTION OF GOING TO THE TRUCK.

Q YOU WERE STANDING ALONGSIDE THE TRUCK AND LOOKING THROUGH THE WINDOW, CORRECT?

A I DON'T REMEMBER LOOKING THROUGH THE WINDOW.

Q DO YOU RECALL SAYING IN THE INTERVIEW, "WHEN I GOT TO A CERTAIN PART OF THE TRUCK, I WAS LOOKING THROUGH THE WINDOW AND SO THEY WERE A LITTLE BIT BACK AND I COULDN'T REALLY SEE WHAT WAS GOING ON"?

A YES.

Q YOU SAID THAT TO DETECTIVE COMSTOCK, CORRECT?

A YES.

Q YOU WEREN'T JUST WALKING BY, YOU STOPPED TO SEE WHAT WAS GOING ON, WHAT PAUL SOTO WAS DOING TO THE MAN, CORRECT?

A NO. I NEVER STOPPED TO SEE WHAT HE WAS DOING TO THE MAN.

Q "I WAS LOOKING THROUGH THE WINDOW SO THEY WERE [612] A LITTLE BIT BACK AND I COULDN'T SEE WHAT WAS GOING ON," CORRECT?

A YEAH. I COULDN'T SEE WHAT WAS GOING ON. I DIDN'T KNOW IF HE WAS DOING ANYTHING TO THE MAN.

Q DO YOU REMEMBER TELLING DETECTIVE COMSTOCK, "I WAS STANDING ALONGSIDE OF THE TRUCK"?

YOU WEREN'T MOVING ALONGSIDE OF THE TRUCK; YOU WERE STANDING?

A YES. AT SOME POINT I HAD STOPPED.

Q RIGHT. BECAUSE YOU KNEW PAUL SOTO WAS GOING TO ROB THAT MAN, CORRECT?

A NO.

Q YOU JUST HAPPENED TO STOP, IS THAT WHAT YOU'RE TELLING US?

A YES. I NEVER KNEW HE WAS GOING TO ROB THE MAN.

Q I'LL BACK UP. WHAT YOU'RE TELLING US IS YOU JUST HAPPENED TO WALK OVER TOWARDS THIS TRUCK AND PAUL SOTO HAPPENED TO BE WALKING OVER TOWARDS THIS TRUCK AND YOU JUST HAPPENED TO STOP FOR NO REASON. IS THAT WHAT YOU'RE TELLING US?

A WELL, I HAD STOPPED. I HAD NO INTENTION -- I NEVER KNEW HE WAS GOING TO ROB THE MAN OR THAT ANYTHING WAS GOING TO HAPPEN.

MS. NAKAKI: MORE TO STRIKE. NONRESPONSIVE TO THE QUESTION.

THE COURT: OVERRULED. DENIED.

Q BY MS. NAKAKI: LET ME TRY TO ASK IT ANOTHER [613] WAY. YOU'RE TELLING US RIGHT NOW THAT YOU AND MR. SOTO JUST HAPPENED TO BE WALKING TOWARDS THE TRUCK AT THE SAME TIME, CORRECT?

A YES.

Q COINCIDENTALLY, PAUL SOTO IS WALKING TOWARD THE TRUCK AND YOU'RE WALKING TOWARD THE TRUCK, CORRECT?

A YES.

Q AND FOR SOME REASON, YOU JUST HAPPENED TO STAND AND STOP BY THE TRUCK, CORRECT?

A YES. I HAD STOPPED.

Q JUST OUT OF A COINCIDENCE, YOU HAPPENED TO LOOK OVER AND SEE A MAN GETTING SHOT IN THE CHEST?

A NO. I NEVER SAW ANY OF THAT. I EVEN SAY IN MY STATEMENT I NEVER SAW THE SHOT OR SOMEBODY BEING SHOT.

Q DO YOU RECALL SAYING, "I DIDN'T EVEN KNOW IF HE DID THAT. AND THEN ALL I HEARD WAS THE ONE SHOT, AND THEN I SAW THE MAN COME TO THE CAR AFTER HE WAS SHOT IN THE CHEST".

YOU SAW THE MAN WAS SHOT IN THE CHEST, CORRECT?

A I COULDN'T SEE THAT HE WAS SHOT IN THE CHEST.

Q "HE CAME TO THE CAR AND HIT THE CAR."

YOU SAW THAT, DIDN'T YOU?

A YES. I SAW HIM GO TO THE CAR.

Q AND YOU SAW THAT HE WAS SHOT IN THE CHEST?

A NO. I NEVER COULD SEE THAT HE WAS SHOT IN THE CHEST.

Q YOU JUST SAW THE MAN COME TO THE CAR?

[614] A YES.

Q YOU DIDN'T SEE IF THE MAN WAS INJURED?

A WELL, I SAW HE MUST HAVE BEEN INJURED BECAUSE HE HAD KIND OF LIKE FALLEN ON THE TRUCK.

Q AS A MATTER OF FACT, YOU HEARD THE MAN SCREAMING, DIDN'T YOU?

A I HEARD SOMETHING THAT MIGHT HAVE BEEN A SCREAM.

Q YOU HEARD THE MAN SCREAMING BEFORE YOU HEARD THE GUNSHOT, CORRECT?

A NO. I DON'T BELIEVE I HEARD THE MAN SCREAMING BEFORE THE GUNSHOT.

MS. NAKAKI: YOUR HONOR, IF I MAY CONTINUE WITH PEOPLE'S 8?

THE COURT: WHY DON'T WE GO AHEAD AND BREAK? SEE IF YOU CAN LIMIT THE NUMBER OF

TIMES YOU'RE GOING TO BE REFERRING TO THE TAPE. CUE IT UP SO WE ARE READY TO GO.

LADIES AND GENTLEMEN, WE WILL GO AHEAD AND BREAK. WE WILL RECONVENE AT 1:30. REMEMBER MY ADMONITIONS TO YOU IN THE MEANTIME.

(AT 11:50 P.M. THE JURY WAS RELEASED FOR LUNCH UNTIL 1:30 P.M.)

[615]

NORWALK, CALIFORNIA; WEDNESDAY,

MARCH 12, 1997

P.M. SESSION

DEPARTMENT SE-E HON. PHILIP H. HICKOK, JUDGE

APPEARANCES: (AS HERETOFORE NOTED.)

(CHRISTIE SCHIZAS, OFFICIAL REPORTER.)

- - -

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: BACK ON THE RECORD MS. NAKAKI.

MS. NAKAKI: THANK YOU, YOUR HONOR.

+CROSS EXAMINATION (CONTINUED)

BY MS. NAKAKI:

Q NOW, MR. ALVARADO, YOU HAD MENTIONED -- DURING YOUR INTERVIEW ON OCTOBER 24, 1995, WITH DETECTIVE COMSTOCK, YOU HAD TOLD HER THINGS THAT WERE TOLD TO YOU, CORRECT?

A YES.

MS. NAKAKI: YOUR HONOR, I'M GOING TO APPROACH AND -- THERE'S PEOPLE'S 8 -- AND I'M GOING TO PLAY THE RECORDING. AND FOR COUNSEL'S BENEFIT, IT'S BEGINNING PAGE 237.

(WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

Q BY MS. NAKAKI: NOW, MR. ALVARADO, THAT'S YOUR VOICE ON THE TAPE, CORRECT?

[616] A YES, IT IS.

Q THAT WAS PART OF THE INTERVIEW YOU HAD WITH DETECTIVE COMSTOCK ON OCTOBER 24, 1995, CORRECT?

A YES, IT WAS.

Q IN THAT PORTION OF THE INTERVIEW, YOU TOLD DETECTIVE COMSTOCK THAT YOU WERE STANDING AROUND WITH MANUEL AND PAUL, CORRECT?

A YES.

Q AND, IN FACT, YOU WERE STANDING AROUND WITH MANUEL AND PAUL AT THAT POINT, CORRECT?

A I BELIEVE THEY WERE NEAR AROUND THE SAME AREA.

Q YOU SAY "NEAR AROUND THE SAME AREA." WHAT AREA ARE YOU TALKING ABOUT?

A BY THE SIDE WALL OF THE MARKET BY THE PLANTER.

Q YOU ARE TALKING ABOUT JACK'S MARKET, CORRECT?

A YES.

MS. NAKAKI: YOUR HONOR, I'LL BE APPROACHING THE WITNESS WITH THE PHOTOGRAPH MARKED DEFENSE "D".

THE COURT: VERY WELL.

Q BY MS. NAKAKI: CAN YOU SEE DEFENSE "D"?

A YES, I CAN.

Q DO YOU SEE WHERE THIS ORANGE CIRCLE IS ON DEFENSE "D"?

A YES.

Q WAS THAT WHERE YOU, PAUL, AND MANUEL WERE STANDING?

A YES. AROUND THAT AREA.

Q WHEN YOU SAY IN THAT GENERAL AREA, WERE YOU [617] ALL TOGETHER?

A WELL, I NEVER REALLY PAID ATTENTION TO WHERE EACH OF THEM WERE SITTING OR STANDING, BUT I BELIEVE THEY WERE AROUND BY THAT PLANTER.

Q DO YOU REMEMBER JUST LISTENING TO THE TAPE AND HEARING THE QUESTION:

"OKAY. AND THEN MANUEL GETS OFF THE PHONE, AND YOU GUYS ARE ALL SORT OF STANDING AROUND TALKING?

"A YEAH, TALKING AND JUST --

EVERYBODY'S JUST TRYING TO THINK OF SOMETHING TO DO AND HOW TO GET HOME."

DO YOU REMEMBER TELLING THAT TO DETECTIVE COMSTOCK?

A YES, I DO.

Q THERE WAS A CONVERSATION GOING ON BETWEEN YOU, PAUL, AND MANUEL, CORRECT?

A NO. IT NEVER SAYS BETWEEN ME AND PAUL. I WAS TALKING TO VALERIE AT THE TIME, I BELIEVE.

Q SO YOU WERE TALKING WITH THE GROUP?

A NO. I LIMITED REALLY MY CONVERSATION WITH VALERIE, BUT THERE WERE -- PEOPLE IN THE GROUP WERE TALKING TO EACH OTHER OR SO FORTH LIKE THAT.

Q SO YOU WERE PART OF THE GROUP AT THIS POINT, CORRECT?

A I BELIEVE SO, YES.

Q AND THEN DO YOU REMEMBER TELLING ALSO DETECTIVE COMSTOCK THAT IT WAS ABOUT FIVE OR TEN MINUTES [618] AFTER MANUEL IS OFF THE PHONE THAT PAUL MAKES THE SUGGESTION ABOUT TAKING THE TRUCK?

A THIS IS WHAT I HAD HEARD FROM OTHER PEOPLE, THAT THE SUGGESTION WAS AROUND THAT TIME BECAUSE --

MR. BERNSTEIN: OBJECT AS HEARSAY, YOUR HONOR.

THE COURT: THE SECOND PART OF THAT STATEMENT IS HEARSAY. IT WILL GO OUT. THE FIRST PART STAYS IN.

Q BY MS. NAKAKI: DO YOU REMEMBER DURING YOUR INTERVIEW WITH DETECTIVE COMSTOCK AND YOU HEARD THE INTERVIEW, THIS PORTION OF IT:

"Q HOW LONG AFTER MANUEL'S OFF THE PHONE DOES PAUL MAKE THE SUGGESTION ABOUT TAKING THE TRUCK?

A MAYBE FIVE, TEN MINUTES."

A I DON'T UNDERSTAND YOUR QUESTION.

Q DID YOU SAY THAT TO DETECTIVE COMSTOCK? THAT'S THE QUESTION.

A YES.

Q NOW YOU'RE SAYING YOU HEARD THIS FROM OTHER PEOPLE?

A LATER AFTER ALL THIS HAD HAPPENED AND ME AND MANUEL HAD GONE TO HIS ROOM FOR THE NIGHT.

MR.BERNSTEIN: OBJECTION, YOUR HONOR. HE'S RECITING HEARSAY AT THIS POINT.

THE COURT: NO. OVERRULED.

HOWEVER, MR. ALVARADO, LET ME CAUTION YOU NOT TO TELL US WHAT SOMEBODY TOLD YOU. YOU CAN SAY YOU HAD A CONVERSATION WITH SOMEBODY, BUT YOU CAN'T TELL US THE [619] CONTENT OF THE CONVERSATION.

MR. BERNSTEIN: EXCUSE ME, YOUR HONOR. BUT, IN EFFECT, IT'S ALREADY -- HE'S IDENTIFIED THE CONTENTS AS BEING ATTRIBUTED TO HIM AS BEING HEARSAY.

THE COURT: OVERRULED.

MR. BERNSTEIN: THANK YOU.

Q BY MS.NAKAKI: YOU DO RECALL THAT MANUEL HAD BEEN OFF THE PHONE FOR ABOUT FIVE MINUTES WHEN PAUL MADE SOME SORT OF STATEMENT? YOU REMEMBER THAT, CORRECT?

A I THINK SO. I'M NOT REALLY SURE HOW LONG HE HAD BEEN OFF THE PHONE OR WHERE EXACTLY HE WAS AT.

Q DO YOU RECALL -- AND I'M REFERRING TO PAGE 239, AND IT'S LINE 7 THROUGH 9:

"Q OKAY. OKAY. SO AFTER MANUEL'S OFF THE PHONE FOR ABUT FIVE MINUTES?

"A ABOUT FIVE, TEN MINUTES."

YOU DID TELL DETECTIVE COMSTOCK THAT?

A YES.

Q PAUL MADE A STATEMENT SOMETIME AFTER MANUEL IS OFF THE PHONE, CORRECT?

A THAT'S WHAT I WAS TOLD, YES. I NEVER HEARD IT MYSELF.

Q YOU ARE SAYING MANUEL IS TELLING YOU THIS?

A YES.

MS. NAKAKI: IF I MAY APPROACH. IT'S GOING TO BE BEGINNING PAGE 239, BEGINNING LINE 10.

Q AND MR. ALVARADO, WHY DON'T YOU GO AHEAD AND LISTEN TO THIS.

[620] (WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

Q BY MS. NAKAKI: AGAIN, MR. ALVARADO, THAT WAS YOUR VOICE ON THAT TAPE, CORRECT?

A YES, IT WAS.

Q AND THAT WAS PART OF THE SAME INTERVIEW WITH DETECTIVE COMSTOCK ON OCTOBER 24, 1995, CORRECT?

A YES.

Q NOW, IN THAT PORTION YOU WERE ASKED SPECIFICALLY WHAT, IF YOU REMEMBER, APPROXIMATELY WERE PAUL'S WORDS, CORRECT?

A YES.

Q AND YOUR ANSWER WAS:

"A UM, SO DO YOU WANT TO GO GET A CAR OR DO YOU WANT -- DO YOU WANT TO FIND A RIDE HOME OR --"

YOU SAD THAT TO DETECTIVE COMSTOCK, CORRECT?

A YES, I DID.

Q THAT'S WHAT YOU HEARD, CORRECT?

A THAT'S WHAT I HEARD FROM SOMEONE ELSE.

WHEN -- AT THE TIME WHEN I TOLD DETECTIVE COMSTOCK THIS, IT WAS THINGS --

MS. NAKAKI: YOUR HONOR, I BELIEVE HE'S ANSWERED THE QUESTION.

Q WHO TOLD YOU THIS?

A MANUEL.

[621] Q NOW, YOU WERE ASKED:

"Q AND WAS HE SAYING IT TO SOMEONE IN PARTICULAR?

"A WELL, HE WAS SAYING THAT TO -- WHEN HE WAS SAYING IT, HE WAS SAYING IT OUT LOUD AND THE GROUP RIGHT THERE."

DID YOU TELL DETECTIVE COMSTOCK THAT?

A YES.

Q YOU WERE PART OF THAT GROUP RIGHT THERE, CORRECT?

A YES.

Q AND YOU STATED HE WAS SAYING IT OUT LOUD, CORRECT?

A YES.

Q SO HE WAS ADDRESSING THE GROUP, CORRECT?

A I ASSUME HE WAS.

Q AND THEN WERE YOU ASKED THE QUESTION:

"SO HE DIDN'T SAY --

"A NO. HE --

"Q -- 'DESMOND,' OR HE DIDN'T ADDRESS IT TO ANYBODY, JUST THE GROUP?

"A NO. HE SAID IT TO THE -- YEAH, TO THE GROUP SPEAKING OUT LOUD."

YOU WERE STILL PART OF THAT GROUP, CORRECT?

A YES.

Q AND YOU'RE TELLING US YOU DIDN'T HEAR ANYTHING?

A NO, BECAUSE I WAS BUSY IN A CONVERSATION WITH [622] VALERIE.

Q AND DO YOU RECALL TELLING DETECTIVE COMSTOCK THAT PAUL SOTO ASKED, "WHO IS GOING TO GO WITH ME, WHO IS GOING TO GO AND WATCH OUT, SOMETHING LIKE THAT"?

"AND SO I WENT, AND THEN THAT'S WHEN I WENT ON THE OTHER SIDE AND HE WENT TO THE DRIVER."

A I JUST WENT -- I HAD NO PURPOSE TO GO -- TO GO WATCH OUT OR GO AND HELP, ANYTHING LIKE THAT.

MS. NAKAKI: YOUR HONOR, I'LL READ FROM PAGE 239, BEGINNING LINE 23:

"Q AND THEN WHAT WAS SAID?

"A UM, AND EVERY -- AND THEN I DON'T REMEMBER ANYBODY'S ANSWERS, OR I DON'T REMEMBER ANYBODY ANSWERING. LIKE, UH, IF

I REMEMBER CORRECTLY, EVERYBODY JUST STOOD LIKE QUIET, LIKE -- OH, WELL. UH, I DON'T KNOW. UM, AND THEN WE -- AND THEN, UM, HE HAD GONE WITHIN -- UH, HE NEVER ASKED -- HE NEVER, LIKE, REALLY ASKED ME. JUST, YOU KNOW, 'OH, YOU WANT TO GO?' AND THEN, UM, HE'S ALL, 'WELL, ARE YOU GOING TO GO WITH ME, OR WHO IS GOING TO GO WITH ME? WHO IS GOING TO GO AND WATCH OUT AND SOMETHING LIKE THAT.' SO I WENT. AND THEN THAT'S WHEN I WENT ON THE OTHER SIDE AND HE WENT TO THE DRIVER."

DID YOU TELL THAT TO DETECTIVE COMSTOCK?

A. YES, I DID.

[623] Q SO YOU TOLD DETECTIVE COMSTOCK THAT PAUL SOTO SAID, "WHO IS GOING TO GO WITH ME? WHO IS GOING TO GO AND WATCH OUT AND

SOMETHING LIKE THAT? SO I WENT. AND THEN THAT'S WHEN I WENT ON THE OTHER SIDE AND HE WENT TO THE DRIVER"?

A NOT THAT HE TOLD ME, BUT THAT -- IT'S JUST WHAT I HAD HEARD THAT WAS SAID OUT IN THE GROUP.

Q AND IT WAS JUST A COINCIDENCE THAT YOU HAPPENED TO WALK OVER IN THE DIRECTION OF THE TRUCK AT THE SAME TIME THAT PAUL SOTO DID?

A I HAD BEEN WANDERING AROUND THE WHOLE NIGHT WHEN WE HAD WALKED UP THERE. I EVEN SAID IN THE REPORT THAT WE WEREN'T WALKING TOGETHER.

Q I'LL BACK UP A LITTLE BIT. IF I RECALL, JUST THE PRIOR QUESTIONING YOU SAID YOU WERE PART OF THE GROUP, CORRECT?

A YES.

Q WHEN PAUL WAS TALKING, CORRECT?

A (WITNESS INDICATES BY NODDING HEAD UP AND DOWN.)

Q IS THAT A "YES"?

A YES.

Q AND THEN WHILE WERE YOU PART OF THIS GROUP, PAUL WALKED OVER TOWARDS THE TRUCK, CORRECT?

A YES.

Q AND YOU JUST HAPPENED TO COINCIDENTALLY WALK OVER AT THE SAME TIME, CORRECT?

A YES.

[624] Q NOW, YOU ALSO TOLD DETECTIVE COMSTOCK THAT PAUL SOTO DIRECTED THE GROUP TO A PARTICULAR VEHICLE THAT HE WAS TALKING ABOUT, CORRECT?

A YES.

Q HOW DID HE DO THAT?

A WELL, I GUESS HE WAS JUST LOOKING UP IN THAT DIRECTION.

Q YOU SAW HIM LOOKING IN THAT DIRECTION, CORRECT?

A WELL, I SAW HIM LOOKING OUT STRAIGHT AHEAD.

Q DO YOU REMEMBER THIS? AND IT'S PAGE 240, BEGINNING LINE 6:

"Q WHEN HE MADE THE STATEMENT ABOUT SOMETHING TO THE EFFECT OF, 'UH, YOU WANT TO GO GET A CAR, YOU WANT A RIDE HOME?' WAS HE INDICATING IN SOME MANNER THE PICKUP TRUCK?

"A YES, BECAUSE THE -- THE MAN IN THE -- THE PICKUP TRUCK WAS OUT OF THE CAR AND SORT OF INTO THE DUMPSTER, GETTING OFF THE -- THE CARDBOARDS."

DO YOU REMEMBER TELLING DETECTIVE COMSTOCK THAT?

A YES.

Q YOU WERE STILL PART OF THAT GROUP OF PEOPLE BY THE PLANTER, CORRECT?

A YES.

Q AND YOU SAW THIS MAN GETTING CARDBOARDS OUT OF THE DUMPSTER, CORRECT?

[625] A YES, I DID.

Q SO YOU'RE STILL PART OF THIS GROUP HERE, CORRECT?

A YES.

Q AND PAUL WAS LOOKING IN THE DIRECTION OF THE PICKUP TRUCK; IS THAT CORRECT?

A YES. WELL, IT APPEARED THAT HE WAS LOOKING OUT IN THAT DIRECTION BECAUSE MY BACK WAS TO THE PICKUP TRUCK, TO THE DUMPSTER, WHEN I WAS TALKING TO VALERIE.

Q YOU'RE STILL PART OF THIS GROUP?

A YES.

Q NOW, YOU SAY YOU'RE TALKING TO VALERIE. WHERE IS VALERIE IN THIS GROUP OF PEOPLE?

A SHE'S ON THE SIDEWALK, BUT WE WERE -- EVERYBODY WAS BY THE PLANTER, MORE BY THE PLANTER. WE WERE MAYBE IN THE MIDDLE OF THE SIDEWALK, CLOSER TO THE EDGE.

Q HOW FAR FROM THE GROUP -- WHEN YOU TALK ABOUT A GROUP -- WERE YOU FROM WHERE YOU'RE SITTING TO WHERE I AM WHEN PAUL WAS MAKING THE STA1EMENT? I'M BEING PAUL; YOU YOURSELF.

A MAYBE A LITTLE CLOSER. MAYBE TO THE FRONT OF THIS DESK. FROM WHERE YOU WERE -- FROM WHERE YOU WERE AT TO THE FRONT OF THIS DESK.

Q FROM THIS POINT TO THE FRONT OF COUNSEL TABLE.

THE COURT: APPROXIMATELY SIX FEET.

Q BY MS. NAKAKI: SO PAUL AND YOU WERE ABOUT SIX FEET APART; IS THAT CORRECT?

A YES.

[626] Q NOW, THIS TRUCK WAS STOPPED FOR APPROXIMATELY HOW LONG BEFORE YOU AND PAUL HAPPENED TO BOTH GO TOWARDS THE TRUCK?

A I CAN'T REALLY SAY. I NEVER SEEN WHEN IT FIRST PULLED UP, SO I DON'T KNOW HOW LONG IT WAS THERE BEFORE.

Q NOW, MR. SOTO HAD A GUN THAT NIGHT, CORRECT?

A YES.

Q AND THAT'S THE PERSON YOU IDENTIFIED IN COURT TODAY, CORRECT?

A YES.

Q AND YOU SAW THAT GUN BEFORE MR. SOTO WALKED TOWARDS THE TRUCK, CORRECT?

A YES.

Q HE SHOWED IT TO YOU, CORRECT?

A WELL, HE HAD FLASHED IT. AND I WAS LOOKING IN A DIFFERENT DIRECTION AND FIGURED OUT LATER THAT IT WAS A GUN.

Q HE SHOWED IT TO YOU, CORRECT?

A NO. HE WASN'T SHOWING IT TO ME. IT SEEMED LIKE HE HAD JUST FLASHED IT, MAYBE SHOWED IT TO THE GROUP SOMETHING.

MS. NAKAKI: YOUR HONOR, IF I MAY JUST CONTINUE WITH THE TAPE. THERE'S A PORTION THAT MAY NOT PERTAIN TO THIS, BUT IF WE CAN PLAY IT THROUGH.

(WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

[627] Q BY MS. NAKAKI: MR. ALVARADO, YOU SAID YOU NEVER HEARD PAUL MAKE ANY SORT OF THE STATEMENT, CORRECT?

A CORRECT.

Q BUT DETECTIVE COMSTOCK DID ASK YOU HOW LONG THE TRUCK HAD BEEN STOPPED IN FRONT OF THE DUMPSTER WHEN PAUL SAID THIS. DO YOU REMEMBER BEING ASKED THAT?

A YES.

Q AND YOU ANSWERED, "A MINUTE OR TWO"?

A YES.

Q SO SOMEONE TOLD YOU THAT THE TRUCK HAD BEEN STOPPED IN FRONT OF THE DUMPSTER FOR A MINUTE OR TWO BEFORE PAUL MADE THE STATEMENT?

A NO I ASSUMED MYSELF IT HAD BEEN THERE FOR ABOUT THAT LONG.

Q NOW, YOU INDICATED THAT YOU HAD SEEN THE GUN, CORRECT?

A YES.

Q CAN YOU DESCRIBE THE GUN FOR US?

A WELL, WHEN I SAW THE GUN IT WAS AFTER EVERYTHING HAD TAKEN PLACE. AND I BELIEVE IT WAS BLACK. SEEMED LIKE A REAL BIG GUN, BLACK, AND I THINK IT HAD LIKE A DARK-COLOR HANDLE, A BROWN HANDLE.

Q YOU HAD SEEN IT AT THE SHOPPING CENTER ALSO, THOUGH?

A NOT AT THE SHOPPING CENTER. I'M TALKING -- WHEN I HAD SEEN IT, IT WAS AFTER ALL THIS.

Q DO YOU RECALL THIS? AND THIS IS ON PAGE 241, [628] LINE 6:

"Q OKAY. AT WHAT POINT DID YOU SEE PAUL WITH THE GUN?

"A UM, WHEN WE HAD -- WHEN HE WAS SITTING DOWN AT THE VERY LAST MINUTE, BEFORE HE APPROACHED THE TRUCK, HE HAD JUST WENT LIKE THAT, AND HE HAD LIKE PULLED IT OUT OF HIS POCK -- I DON'T KNOW IF HE PULLED IT OUT OF HIS POCKET OR HIS PANTS -- AND PULLED IT LIKE THAT AND SHOWED IT AND PUT IT BACK. BUT THEN HE HAD PUT IT IN HIS POCKET."

DO YOU REMEMBER TELLING DETECTIVE COMSTOCK THAT ON OCTOBER 24, 1995?

A YES.

Q YOU SAW PAUL WITH THE GUN BEFORE HE APPROACHED THE TRUCK AT THE SHOPPING CENTER, CORRECT?

A NO, NOT BEFORE.

Q YOU TOLD DETECTIVE COMSTOCK THIS, CORRECT?

A YES, I DID.

Q AND YOU ALSO TOLD DETECTIVE COMSTOCK THAT "HE WAS SITTING BACK AND I WAS LIKE IN FRONT OF HIM AND SO HE DID IT WITH HIS LEFT HAND, I BELIEVE."

YOU TOLD DETECTIVE COMSTOCK THAT, CORRECT?

A YES.

Q SO YOU SAW PAUL WITH THE GUN IN HIS LEFT HAND?

A I HAD SEEN SOMETHING IN HIS LEFT HAND. AND LATER, AFTER, I REALIZED WHEN I HAD TIME TO THINK ABOUT IT, THAT THERE WAS A SHOT, SO I ASSUMED THAT THAT IS PROBABLY [629] THE GUN THAT HE HAD FLASHED.

Q NOW, YOU HAD STATED PREVIOUSLY -- YOU TOLD DETECTIVE COMSTOCK THAT YOU SAW HIM, "HE HAD LIKE PULLED IT OUT OF HIS POCK -- I DON'T

KNOW IF HE PULLED IT OUT OF HIS POCKET OR HIS PANTS -- AND PULLED IT LIKE THAT AND SHOWED IT AND PUT IT BACK."

HE SHOWED SOMETHING TO YOU, CORRECT?

A YES.

Q HE SHOWED YOU THE GUN, CORRECT?

A WELL, NOW I REALIZE THAT IT WAS A GUN.

Q IT WAS VERY LARGE?

A IT MUST HAVE BEEN. I NEVER SAW CLEARLY IN HIS HAND WHAT IT WAS.

MS. NAKAKI: AT THIS POINT, I'M GOING TO APPROACH DEFENSE "D".

Q WE ARE TALKING ABOUT THIS AREA RIGHT HERE, CORRECT?

A YES.

Q AND THAT'S WHERE HE PULLED IT OUT OF, EITHER HIS POCKET OR PANTS, CORRECT?

A YES.

Q AND THERE'S LIGHTING COMING FROM THE DONUT AREA, RIGHT?

A YES.

Q IT'S LIT THERE, CORRECT?

A (WITNESS NODS.)

Q YES?

A YES.

[630] Q YOU DESCRIBED THE GUN AS A REVOLVER; IS THAT CORRECT?

A YES, I BELIEVE SO.

Q AND DO YOU RECALL WHAT CALIBER?

A NO.

Q DO YOU RECALL WHAT COLOR THE GRIPS WERE?

A I BELIEVE IT HAD LIKE A TAN OR DARK -- LIKE A BROWN.

Q DO YOU RECALL, WAS IT A SHORT BARREL? LONG BARREL?

A I CAN'T RECALL. IT SEEMED LIKE IT WAS A BIG GUN.

Q NOW, WHEN PAUL HAD PULLED SOMETHING EITHER OUT OF HIS POCKET OR HIS WAIST AREA; YOU WERE STANDING?

A YES, I WAS.

Q PAUL WAS SEATED?

A YES, HE WAS.

Q WAS HE SEATED ON THE CURB?

A NO. ON THE EDGE OF THE PLANTER.

Q AND HOW FAR WAS HE FROM YOU WHEN HE DISPLAYED THIS ITEM THAT YOU'RE NOT SURE WHAT IT WAS?

A ABOUT THE SAME DISTANCE.

Q SIX FEET?

A ABOUT THERE.

Q WHERE WAS VALERIE?

A I BELIEVE ALMOST TO MY SIDE OR IN FRONT OF ME.

Q AND SHE WAS STANDING, ALSO?

A YES.

[631] Q HOW ABOUT DESMOND?

A I DON'T KNOW WHERE DESMOND WAS AT.

Q WHERE WAS MANUEL RIVERA?

A I HAVE NO IDEA WHERE MANUEL WAS AT.

Q YOU SAID YOU HAD AN OPPORTUNITY TO VIEW THE GUN LATER; IS THAT CORRECT?

A YES.

MS. NAKAKI: YOUR HONOR, I'M REMOVING THE CONTENTS OF PEOPLE'S 3. IT'S BEEN CHECKED BY THE BAILIFF.

Q DO YOU SEE THIS, MR. ALVARADO?

A YES.

Q IS THIS THE GUN THAT YOU HANDLED AFTER THE SHOOTING?

A I CAN'T BE SURE.

Q WHAT IS DIFFERENT ABOUT IT?

A IT LOOKS SMALLER.

Q WHAT LOOKS SMALLER?

A THE GUN.

Q THE WHOLE GUN?

A YES.

Q ARE THE HANDLE -- THE GRIPS THE SAME COLOR THAT YOU RECALL?

A NO. I THINK IT WAS LIGHTER. I DON'T REMEMBER NO BLACK OR WHATEVER COLOR THAT IS IN THE GRIP.

Q THIS IS A REVOLVER, CORRECT?

A YES.

Q WAS THE REVOLVER THAT YOU SAW THAT EVENING BLACK?

[632] A YES.

Q YOU CALLED IT A TAN HANDLE TODAY, CORRECT? THAT'S YOUR RECOLLECTION?

A I DON'T REMEMBER IT BEING THAT DARK.

Q DO YOU RECALL WHEN YOU WERE ASKED BY DETECTIVE COMSTOCK YOU SAID IT HAD A BROWN HANDLE?

A YES.

MS.NAKAKI: YOUR HONOR, IF I MAY, I'LL START PLAYING THE TAPE AGAIN FROM, I BELIEVE, PAGE 242, LINE 6.

(WHEREUPON A PORTION OF PEOPLE'S 8, AND AUDIO TAPE, WAS PLAYED.)

Q BY MS. NAKAKI: YOU TOLD DETECTIVE COMSTOCK THAT YOU SAW THIS ITEM, THAT YOU WEREN'T SURE WHAT IT WAS, BEFORE PAUL APPROACHED THE TRUCK, RIGHT?

A YES.

Q WHEN PAUL PULLED IT OUT OF EITHER HIS POCKET OR WAISTBAND, HE PULLED SOMETHING ABOUT THIS SIZE OUT?

A I CAN'T BE SURE. I NEVER SAW CLEARLY WHAT WAS IN HIS HAND.

Q BUT HE PULLED SOMETHING OUT OF HIS POCKET?

A I BELIEVE SO, YES.

Q SOMETHING EITHER OUT OF HIS POCKET OR WAISTBAND?

A YES.

Q AND IT WAS IN HIS LEFT HAND?

A YES, I BELIEVE.

[633] Q HE TOOK IT FROM HIS LEFT HAND AND PUT IT IN HIS POCKET?

A I'M NOT SURE WHERE HE PUT IT AFTER.

Q HE DID TAKE IT OUT OF EITHER HIS POCKET OR WAISTBAND, CORRECT?

A YES.

Q THIS WAS FROM ABOUT SIX FEET AWAY IN FRONT OF THE DONUT PLACE BY THE PLANTER?

A YES.

Q BUT THIS WHOLE SITUATION WHERE PAUL TOOK SOMETHING OUT OF EITHER HIS POCKET OR WAISTBAND, PULLED IT OUT AND PUT IT BACK IN HIS LEFT POCKET, HAPPENED BEFORE HE APPROACHED THE TRUCK, CORRECT?

A YES.

Q NOW, WHEN PAUL APPROACHED THE TRUCK, YOU APPROACHED THE TRUCK AT THIS POINT, CORRECT?

A YES, AFTER.

Q SORRY?

A AFTER.

Q WHEN PAUL BEGAN WALKING TOWARDS THE TRUCK, YOU ALSO APPROACHED THE TRUCK, TOO, CORRECT?

A YES.

Q JUST BY COINCIDENCE, CORRECT?

A YES.

Q YOU HAD NO REASON TO APPROACH THE TRUCK, CORRECT?

A WELL, I HAD NO REASON TO BRING ANY HARM OR ANYTHING THAT MIGHT HAVE HAPPENED. I HAD NO REASON FOR ANY [634] OF THAT.

Q SO, AT THIS POINT, PAUL IS WALKING TOWARDS THE TRUCK AND YOU DON'T KNOW WHY, CORRECT?

A YES.

Q AND YOU COINCIDENTALLY, AT THE SAME TIME, APPROACH THE PASSENGER SIDE OF THE TRUCK, CORRECT?

A YES.

Q THERE'S NO REASON FOR YOU TO APPROACH THE PASSENGER SIDE OF THE TRUCK, CORRECT?

A YES.

Q DO YOU KNOW THE MAN AT THE TRUCK?

A NO.

Q WERE YOU PLANNING TO COLLECT CARDBOARDS?

A NO.

Q THAT WAS NOT YOUR TRUCK BY THE DUMPSTER, WAS IT?

A NO, IT WAS NOT.

Q SO YOU JUST HAPPENED TO BE APPROACHING THE PASSENGER SIDE OF THE TRUCK AT THIS POINT?

A YES.

MS. NAKAKI: YOUR HONOR, IF I MAY JUST CONTINUE PLAYING.

THE COURT: YES.

(WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

Q BY MS. NAKAKI: MR. ALVARADO, YOU JUST TOLD US THAT YOU HAD, FOR NO APPARENT REASON, WALKED UP TOWARDS THE [635] PASSENGER SIDE OF THE TRUCK, CORRECT?

A YES.

Q NO REASON TO BE THERE?

A YES.

Q JUST GOING FOR A WALK?

A WELL, I HAD BEEN WANDERING AROUND THE WHOLE NIGHT, WALKING AROUND.

Q BUT YOU STOPPED AT THE PASSENGER SIDE OF THE TRUCK, CORRECT?

A YES.

Q FOR NO REASON, CORRECT?

A YES.

Q NOW, YOU HAD STATED PREVIOUSLY THAT YOU DID NOT KNOW IT WAS A GUN. DO YOU REMEMBER BEING ASKED ABOUT WHETHER VALERIE HAD SEEN THE GUN? AND THE QUESTION WAS ON PAGE 243, LINE 4:

"Q DO YOU KNOW IF SHE SAW IT?

"A I HAVE NO IDEA BECAUSE I HAD -- WHEN -- WHEN I LOOKED DOWN AT THE GUN, I DIDN'T LOOK TO SEE WHO ELSE HAD SEEN IT. I LOOKED DOWN TO SEE WHAT IT WAS."

DO YOU REMEMBER TELLING DETECTIVE COMSTOCK THAT?

A YES.

Q DO YOU REMEMBER TELLING HER YOU HAD SEEN THE GUN?

A WELL, YES, BECAUSE AFTER I REALIZE THAT IT WAS A GUN THAT WAS IN HIS HANDS. NOT FROM MY OWN EYES SEEING [636] IT, BUT LATER BEING ABLE TO TALK TO SOMEBODY ELSE AND WHAT THEY HAD SAID.

Q IS THIS MANUEL, THE PERSON YOU TALKED TO?

A YES. WE HAD TALKED AFTER THAT NIGHT.

Q AFTER THAT NIGHT, YOU TALKED ABOUT WHAT HAD HAPPENED?

A THAT NIGHT, TOO.

Q AND THE NEXT NIGHT AND THE NEXT NIGHT, OR SOMETIME AFTER YOU TALKED ABOUT IT WITH MANUEL?

A WHENEVER WE WOULD RUN INTO EACH OTHER AND SEE EACH OTHER SOMEWHERE.

Q SO YOU WOULD DISCUSS ABOUT MR. SOTO PULLING THE GUN OUT OF EITHER HIS POCKET OR WAISTBAND?

A ABOUT EVERYTHING ABOUT WHAT HAPPENED THAT NIGHT.

Q NOW, YOU ARE TELLING US THAT YOU HAD NO IDEA WHAT WAS GOING ON AND YOU HAPPENED TO BE WALKING BY THE PASSENGER SIDE OF THE TRUCK AND STOPPING FOR NO REASON. DO YOU REMEMBER TELLING DETECTIVE COMSTOCK THAT YOU WEREN'T SURE IF PAUL WAS GOING TO PULL OUT THE GUN AS SOON AS HE WALKED UP OR WAIT TO SEE IF THE MAN GAVE HIM A FIGHT? DO YOU REMEMBER TELLING DETECTIVE COMSTOCK THAT?

A YES.

Q SO YOU KNEW PAUL HAD A GUN, CORRECT?

A WELL, YES, AFTER, BECAUSE THIS INTERVIEW WAS AFTER I HAD KNOWN THE FACT

THAT IT WAS A GUN. SO IN COOPERATION WITH THE INTERVIEW, THAT'S WHAT I HAD TOLD HER.

Q SO YOU WERE SPECULATING, IS THAT WHAT YOU'RE [637] SAYING?

A I WAS PRETTY MUCH GUESSING.

MS. NAKAKI: YOUR HONOR, I'M GOING TO CONTINUE WITH THE TAPE.

THE COURT: OKAY.

MR. GUTIERREZ: YOUR HONOR, MAY WE APPROACH?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR.)

MR. GUTIERREZ: REGARDING THE GUN, IF THERE'S NOT GOING TO BE A PROPER FOUNDATION, THIS JUST AUGMENTS THE PREJUDICIAL ASPECT.

THE COURT: DON'T MAKE ANY MORE REFERENCE TO THAT OBJECT.

MS. NAKAKI: MAY I MAKE AN OFFER OF PROOF?

THE COURT: YOU DON'T HAVE ANY WAY TO AUTHENTICATE?

MS. NAKAKI: YES. LET ME EXPLAIN. THE REASON I WAS SAYING I DIDN'T KNOW IF I WAS GOING TO HAVE REBUTTAL WITNESSES, IN MR. ALVARADO'S INTERVIEW WITH DETECTIVE COMSTOCK HE BASICALLY TELLS DETECTIVE COMSTOCK THAT DESMOND PACHECO, ALONG WITH AN INDIVIDUAL KNOWN AS SHY BOY, COME BY THE NEXT DAY BECAUSE AT THIS POINT MR. ALVARADO, MR. SOTO, AND RIVERA HAD TAKEN THE GUN SOMEWHERE ELSE.

SO I DON'T KNOW WHAT THIS WITNESS IS GOING TO SAY. IF HE SAYS, YES, DESMOND AND ANOTHER PERSON AND I HAVE [638] A PICTURE OF

SHY BOY. HIS ATTORNEY IS ROMAN. MACIAS CAME BACK, PICKED UP THE GUN. ROMAN IS -- MACIAS IS ARRESTED FOUR DAYS LATER. I HAVE THE DEPUTY ON CALL.

SO IF MR. ALVARADO LOOKS AT A PICTURE OF MR. MACIAS -- THAT'S THE WAY THAT WAS WITH DESMOND -- THAT CAME BACK TO THE HOUSE THE NEXT DAY, THE PEOPLE'S POSITION IS THERE IS ADEQUATE CONNECTION FOR THE GUN TOO. THE PROBLEM --

MR. GUTIERREZ; THAT'S A BIG IF. YOU COULD HAVE SHOWN THE PROOF BEFORE YOU SHOWN THE GUN. YOU GOT AN EXPERT TO TALK ABOUT THE GUN, HOW IT WORKS IS SHOWN IN FRONT OF THE JURY. YOU HAVE NO WAY OF BEING POSITIVE THAT YOU CAN CONNECT IT, AND NOW YOU ARE BRINGING IT OUT AGAIN FOR A SECOND TIME BECAUSE YOU'RE SPECULATING THAT MY

CLIENT, IF SHOWN THE PHOTOGRAPH, IS GOING TO BE IDENTIFIED, SOMEBODY WHO APPARENTLY IS ARRESTED WITH THE GUN.

THE BEST WAY TO DO THAT IS SHOW THE PICTURE FIRST.

THE COURT: NO MORE REFERENCE TO THE GUN.

MR. BERNSTEIN: 402 RIGHT NOW. EVEN IF MR. MACIAS, SHY BOY, IS ARRESTED AND THAT'S THE GUN HE'S ARRESTED WITH FOUR DAYS LATER, THERE'S STILL NO LINK THAT THIS IS THE GUN USED IN THIS CRIME.

MR. GUTIERREZ: MR. MACIAS SAYS HE BOUGHT THE GUN FROM A BLACK MAN AT THE PARK.

THE COURT: IN ANY EVENT, UNLESS YOU CAN TIE IT IN, NO MORE REFERENCE TO THE GUN.

MR. GUTIERREZ: PLAYING THE TAPE WITH EVERYTHING?

[639] THE COURT: YES.

MS. NAKAKI: YOUR HONOR, THE PEOPLE'S POSITION IS THIS --

THE COURT: OKAY. AS FAR AS CROSS-EXAMINATION, I'M NOT GOING TO UNDULY RESTRICT YOU. PLAY THE TAPE; MOVE ON. DON'T PLAY THE TAPE AND READ THE TRANSCRIPT AND THEN ASK A QUESTION ON IT. ONE OR THE OTHER.

MS. NAKAKI: YOUR HONOR, WHAT HAPPENED DURING DIRECT EXAMINATION IS THAT THIS WITNESS IS SAYING, WELL, I DID TELL DETECTIVE COMSTOCK, BUT SOME OF THE THINGS ARE WHAT PEOPLE TOLD ME. I THINK THE PEOPLE ARE TRYING TO FIND OUT WHAT HE IS WILLING TO ADMIT FROM HIS OWN PERSONAL KNOWLEDGE WHAT IS TOLD TO HIM.

THE COURT: AND YOU ARE UNDULY CONSUMING THE TIME RIGHT NOW BY PLAYING THE TYPE AND GOING THROUGH THE TRANSCRIPT.

MS. NAKAKI: I'LL JUST PLAY THE REST OF THE TAPE IN ITS ENTIRETY AND TRY TO PINPOINT AREAS.

THE COURT: I DON'T THINK WE NEED THE TAPE AT ALL. GO THROUGH THE TRANSCRIPT.

MS. NAKAKI: THE PROBLEM IS COUNSEL REFUSED TO STIPULATE THAT THIS WAS A TRUE STATEMENT. SO I CAN'T DO THAT. I HAVE THE TAPE AS THE EVIDENCE. I HAVE TO PLAY THE TAPE. BOTH COUNSEL OBJECT TO USE OF THIS AS A COURTESY TRANSCRIPT, SO THE ONLY THING I CAN DO IS USE THIS TO -- AS A GUIDE TO SEE IF THIS WITNESS IS GOING TO SAY, THIS IS WHAT I SAID. IF HE SAYS NO, THEY HAVE NOT STIPULATED THIS IS A TRUE AND CORRECT VERSION OF THE TAPE.

[640] MR. GUTIERREZ: YOU'RE DOING DIRECT.

THE COURT: YOU CAN'T DO BOTH. YOUR CHOICE. ONE OR THE OTHER, NOT BOTH. YOU GOT

THE TAPE, YOU GOT THE TAPE. NO MORE TRANSCRIPT.

MS. NAKAKI: LET ME ASK THIS. I WANT TO BE ABLE TO GO THROUGH AND FIND OUT WHAT PART OF THE TAPE, AFTER I PLAY THE TAPE, WHAT PART WAS --

THE COURT: DON'T PLAY THE TAPE. THE JURY ALREADY HEARD THE TAPE, HEARD IT IN ITS ENTIRETY ONCE, AND YOU'VE GONE THROUGH A PORTION OF IT NOW. THEY'RE GOING TO GET IT BACK IN THE JURY ROOM. USE THIS, BUT DON'T DO BOTH.

MS. NAKAKI: JUST SO I'M CERTAIN THAT I'M NOT GOING TO BE CUT OFF UNDULY, I'LL PLAY THE REST OF THE TAPE BUT WANT TO BE GIVEN THE OPPORTUNITY TO ASK ABOUT SPECIFIC AREAS WITH THIS WITNESS INSTEAD OF STOPPING AND STARTING.

THE COURT: THAT'S EXACTLY WHAT YOU'RE DOING.

MS. NAKAKI: I'LL PLAY THE REST OF THE TAPE. I WON'T KEEP STOPPING AND STARTING IT.

THE COURT: IT WILL TAKE JUST TOO MUCH TIME.

MS. NAKAKI: I THINK IT'S GOING TO BE THAT MUCH LONGER TO GO THROUGH THE TRANSCRIPT IF THE COURT WANTS ME TO DO IT THAT WAY.

THE COURT: WHAT PAGE ARE YOU AT?

MS. NAKAKI: EIGHT MORE PAGES.

THE COURT: ANOTHER 20 MINUTES?

MR. GUTIERREZ: IT'S LONGER THAN THAT WHEN YOU CONSIDER THE BREAKS IN THE TAPE. SHE'S WRITING EVERYTHING DOWN, AND THERE'S PAUSES.

[641] MS. NAKAKI: I'LL JUST PLAY THROUGH PAGE --

THE COURT: YOU DO AS YOU WISH. I'LL -- ANY KIND OF CUMULATIVE, REDUNDANT OBJECTIONS YOU MIGHT HAVE?

MR. GUTIERREZ: ON THE GUN, YOUR ADMONITION --

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

MS. NAKAKI: THANK YOU, YOUR HONOR. MAY I PROCEED?

THE COURT: YES.

(WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

Q BY MS. NAKAKI: MR. ALVARADO --

MR. GUTIERREZ: YOUR HONOR, I WOULD ASK THAT THE TAPE TO THAT PORTION BE COMPLETE AND PLAYED TO.

THE COURT: NO.

Q BY MS. NAKAKI: MR. ALVARADO, WHEN YOU WERE ON THE PASSENGER SIDE OF THE TRUCK YOU COULD HEAR SCREAMS, CORRECT?

A WHAT SOUNDED LIKE SCREAMS.

Q YOU COULD HEAR SOMEBODY SAYING, "NO, OH, NO"?

A IT SOUNDED LIKE IT.

Q NOBODY TOLD YOU THAT, CORRECT?

A NO.

Q THAT'S WHAT YOU HEARD CORRECT?

A YES.

[642] Q YOU WERE ASKED HOW FAR PAUL WAS FROM THE MAN. YOU SAID, "ONE TO TWO FEET." YOU COULD SEE THAT, CORRECT?

A NO. I WAS ASSUMING RIGHT THERE.

Q AND YOU ALSO DESCRIBED HOW THE MAN WAS BACKING OFF, CORRECT?

A NOT HOW HE WAS BACKING OFF, BUT HOW HE WENT TOWARDS THE TRUCK AFTER I HEARD THE NOISE.

Q BEFORE THE SHOT, THAT THE MAN SEEMED TO BE BACKING AWAY, TAKING A COUPLE STEPS BACK TOWARDS THE DUMPSTER. YOU COULD SEE THAT, CORRECT?

A I DON'T REMEMBER SEEING THAT.

Q IT'S POSSIBLE YOU COULD HAVE SEEN IT?

A IT'S POSSIBLE.

Q NOW, AFTER YOU HEARD THE SHOT, WAS PAUL ON THE DRIVER'S SIDE OF THE TRUCK WHEN YOU HEARD THE SHOT?

A I BELIEVE SO.

Q WHO WAS ON THE DRIER'S SIDE OF THE TRUCK WHEN YOU WERE STANDING BY THE PASSENGER DOOR?

A I NEVER REALLY SEEN WHO WAS THERE, BUT I'M GOING BY EARLIER WHEN THEY FIRST WALKED UP.

Q WHO WALKED UP TO THE DRIVER'S SIDE OF THE TRUCK?

A PAUL.

Q WHEN YOU SAY "PAUL," YOU'RE REFERRING TO THIS MAN HERE IN COURT TODAY, THE ONE YOU IDENTIFIED, MR. SOTO?

A YES.

Q HE'S THE ONE YOU SAW WALK UP TO THE DRIVER'S SIDE OF THE TRUCK?

[643] A YES.

Q THAT'S WHEN YOU WALKED UP TO THE PASSENGER SIDE?

A YES.

Q DID YOU SEE ANYBODY ELSE ON THE DRIVER'S SIDE OF THE TRUCK?

A I NEVER REALLY LOOKED.

Q SO AS FAR AS YOU KNOW, ONLY PAUL WAS ON THE DRIVER'S SIDE OF THE TRUCK; IS THAT CORRECT?

A WELL, YES.

Q NOW, AFTER YOU HEARD THE SHOT, DID YOU HEAR ANY OTHER SOUNDS?

A I BELIEVE I JUST HEARD SOMETHING THAT SOUNDED LIKE A LOW SCREAM OR -- NOT A SCREAM, BUT LIKE A HOLLER. SOMETHING LIKE THAT.

Q LIKE A REAL SCREAM?

A SOMETHING LIKE A SCREAM, BUT NOT REALLY A SCREAM, A FULL-OUT SCREAM. MAYBE LIKE A -- I'M NOT SURE. I CAN'T REALLY PUT A

WORD TO IT. LIKE MAYBE A LITTLE SCREAM. NOT REALLY A LOUD ONE OR ANYTHING.

Q AFTER YOU HEARD THE SHOT AND THE SCREAM, DID YOU SEE SOMEBODY INJURED?

A NO. I COULDN'T SEE IF THEY WERE INJURED OR NOT.

Q YOU SAW A MAN COMING TOWARDS THE TRUCK; IS THAT RIGHT?

A YES.

Q IT WASN'T MR. SOTO, WAS IT?

[644] A NO.

Q IT WAS ANOTHER MAN, CORRECT?

A YES.

Q AND HE WAS INJURED, CORRECT?

A I COULDN'T REALLY TELL, BUT HE LEANED ON THE TRUCK.

Q WHEN HE LEANED ON THE TRUCK, DID IT APPEAR HE WAS INJURED TO YOU?

A I COULDN'T REALLY TELL.

Q DID YOU SEE BLOOD?

A NO.

Q WHAT WAS THE MAN DOING AS HE WAS LEANING ON THE TRUCK, NOT MR. SOTO, BUT THE OTHER MAN?

A I BELIEVE HE WAS JUST LEANING ON THE TRUCK. I DON'T REMEMBER SEEING HIM DO ANYTHING.

Q WAS HE MAKING ANY SOUNDS?

A I CAN'T REMEMBER.

Q WHAT HAPPENED AFTER YOU HEARD THE SHOT AND SAW THIS MAN, NOT MR. SOTO, BUT THIS MAN LEANING ON THE TRUCK? WHAT DID YOU DO?

A IT FINALLY HIT ME WHAT -- EVERYTHING THAT HAD HAPPENED, AND I REALIZED THAT, YOU KNOW, THE MAN WAS SHOT. I DIDN'T KNOW WHAT TO DO AFTER THAT.

Q YOU WERE ON THE PASSENGER SIDE OF THE TRUCK, AND YOU REALIZED THE MAN HAD BEEN SHOT; IS THAT CORRECT?

A WELL, YEAH, SOMETHING LIKE THAT. I GUESS HE HAD BEEN SHOT OR SOMETHING, BUT I COULDN'T REALLY TELL IF HE WAS INJURED OR -- COULDN'T REALLY TELL.

[645] Q DID YOU CHECK TO SEE IF HE WAS INJURED?

A NO.

Q YOU DON'T KNOW WHAT HAPPENED TO THE MAN?

A NO.

Q DID YOU GO TO THE DRIVER'S SIDE OF THE TRUCK?

A NO, I DID NOT.

Q WHAT DID YOU DO?

A MAYBE AFTER 10 SECONDS OR SO, 10, 15 SECONDS, I REALIZE EVERYTHING THAT HAPPENED. AND I TURNED AROUND AND SEEN EVERYBODY ELSE RUNNING, SO AT FIRST I STARTED WALKING AWAY, NOT KNOWING WHAT TO DO. AND FINALLY WHEN I SEEN EVERYBODY OUT OF SIGHT, I WENT RUNNING MYSELF.

Q YOU WENT BACK TO MANUEL'S HOUSE, CORRECT?

A YES.

Q MR. SOTO WAS THERE?

A YES.

Q THE MAN YOU IDENTIFIED IN COURT TODAY, PAUL SOTO?

A YES.

Q AND YOU SAW SOMETHING ON HIS CLOTHING, DIDN'T YOU?

A NOT ON HIS CLOTHING. I THINK I SAW IT ON HIS HAND.

MS. NAKAKI: YOUR HONOR, I'LL READ FROM THE TRANSCRIPT, AND I'LL BE REFERRING TO PAGE 251.

MR. GUTIERREZ: IT'S NOT CONSISTENT WITH HIS TESTIMONY. OBJECTION. PAGE 251 SAYS ON THE HANDS.

MS. NAKAKI: YOUR HONOR, IF I DIRECT THE COURT AND [646] COUNSEL TO --

THE COURT: WAIT.

OBJECTION SUSTAINED.

MS. NAKAKI: -- LINES 10 THROUGH --

THE COURT: I DON'T HAVE LINE 10. I HAVE LINE 4.

MS. NAKAKI: I HAVE THE COMPLETE TRANSCRIPT. IT GOES BEYOND THAT.

THE COURT: I DON'T HAVE IT.

MS. NAKAKI: LINES 10 THROUGH 18.

THE COURT: YOU MAY SHOW IT TO HIM.

MS. NAKAKI: THE WITNESS HAS AREADY ANSWERED THE QUESTION.

THE COURT: OKAY. HE'S ANSWERED IT, THEN.

Q BY MS. NAKAKI: WOULD IT REFRESH YOUR RECOLLECTION TO REFER TO A TRANSCRIPT OF YOUR INTERVIEW OF OCTOBER 24, 1995, AS TO WHETHER OR NOT YOU SAW BLOOD ON ANY OTHER PART OF MR. SOTO OTHER THAN HIS HANDS?

A YES, IT MIGHT.

MS. NAKAKI: AND I'M GOING TO BE SHOWING THE WITNESS, MR. ALVARADO, PAGE 251, LINES 10 THROUGH 18.

THE WITNESS: (READING.)

Q BY MS. NAKAKI: DOES THAT REFRESH YOUR MEMORY, MR. ALVARADO?

A YES, IT DOES.

Q YOU SAID YOU SAW BLOOD ON HIS HANDS, CORRECT?

A YES.

Q YOU ALSO SAW BLOOD SOMEWHERE ELSE ON MR. SOTO, CORRECT?

[647] A YES.

Q WHERE?

A ON HIS SHIRT.

Q HOW WAS THIS BLOOD ON MR. SOTO'S SHIRT?

A I DON'T UNDERSTAND THE QUESTION.

Q WELL, WAS IT SPLATTERED ON HIS SHIRT, SPLATTERED ON THE CHEST OF THE SHIRT?

A I COULDN'T REALLY TELL. IT WAS ON HIS SHIRT. I DON'T KNOW HOW --

Q DO YOU RECALL TELLING -- I'LL LET THE WITNESS FINISH?

A I --

Q DO YOU RECALL TELLING THE DETECTIVE IT WAS LIKE -- IT WAS JUST LIKE A SPLAT, ALMOST SPLATTERED ON HIS CHEST?

"Q SPLATTERED ON THE CHEST?

"A YES."

IS THAT HOW THE BLOOD WAS ON PAUL SOTO'S SHIRT?

A I BELIEVE SO.

Q NOW, YOU INDICATED THAT YOU HAD SEEN A GUN LATER THAT EVENING, CORRECT?

A YES.

Q AFTER THE SHOOTING?

A YES.

Q AND WHO HAD THE GUN THAT YOU SAW AFTER THE SHOOTING?

A IT WAS JUST IN MANUEL'S BEDROOM ON THE FLOOR.

[648] Q DO YOU KNOW WHO LEFT IT ON THE FLOOR?

A NO, I DON'T.

Q DID YOU DO SOMETHING WITH THAT GUN?

A LATER, YES.

Q NOW, THE GUN THAT WAS ON THE FLOOR, THIS IS IN MANUEL'S BEDROOM?

A YES, IT IS.

Q MANUEL DID NOT HAVE A GUN THAT EVENING, CORRECT?

A TO MY KNOWLEDGE, NO, HE DIDN'T.

Q YOU DID NOT HAVE A GUN THAT EVENING, CORRECT?

A NO, I DID NOT.

Q VALERIE DID NOT HAVE A GUN THAT EVENING, CORRECT?

A CORRECT.

Q DESMOND DID NOT HAVE A GUN THAT EVENING, CORRECT?

A CORRECT.

Q YOU SAID YOU DID SOMETHING WITH THAT GUN LATER THAT EVENING. WHAT DID YOU DO?

A WELL, IN MANUEL'S HOUSE THERE WAS LITTLE BROTHERS, AND I BELIEVE HIS GRANDMOTHER WAS HOME AT THAT TIME AND HIS PARENTS. SO WE HAD AGREED IT WOULD BE BEST WE GET THE GUN OUT OF THE HOUSE AWAY FROM THE CHILDREN.

Q DID YOU TAKE THAT GUN?

A YES.

Q WHAT DID YOU DO WITH THE GUN?

A WE HAD TAKEN IT AND PUT IT BY A PARK.

[649] Q YOU SAY "WE." DID YOU PHYSICALLY PICK UP THAT GUN?

A NOT IN THE HOUSE, NO.

Q WHERE DID YOU PICK IT UP?

A WELL, AFTER WE HAD GONE MAYBE HALFWAY DOWN THE BLOCK, I WAS HANDED IT FROM MANUEL.

Q MS. NAKAKI: YOUR HONOR, I AM GOING TO BE ASKING THE WITNESS TO LOOK AT PAGE 255, BEGINNING LINE 2 THROUGH LINE 5 TO SEE IF IT REFRESHES HIS MEMORY.

THE COURT: VERY WELL.

Q BY MS. NAKAKI: MR. ALVARADO, I WANT YOU TO READ THE TRANSCRIPT BEGINNING LINE 2 THROUGH LINE 5.

A (WITNESS COMPLIES.)

Q DOES THAT REFRESH YOUR MEMORY, MR. ALVARADO?

A YES, IT DOES.

Q YOU PICKED UP THAT GUN, CORRECT?

A CORRECT.

Q AND YOU PUT IT IN YOUR POCKET?

A YES.

Q AND YOU WERE CONCERNED ABOUT MANUEL'S LITTLE BROTHERS AND SISTERS BEING AROUND A GUN, CORRECT?

A YES.

Q SO YOU HID THE GUN, CORRECT?

A YES, I DID.

Q YOU HID IT BY AN ELEMENTARY SCHOOL, DIDN'T YOU?

A YES, I DID.

Q AND YOU HID IT IN SOME BUSHES, CORRECT?

[650] A YES.

Q NOW, THE NEXT DAY DID SOME FOLKS COME TO THE HOUSE REGARDING THE GUN?

A YES, I BELIEVE SO.

Q IT WAS DESMOND PACHECO, CORRECT?

A YES.

Q AND ANOTHER YOUNG MAN, CORRECT?

A YES.

MS. NAKAKI: YOUR HONOR, I HAVE A PHOTOGRAPH I'VE SHOWN TO COUNSEL. IT DEPICTS AN INDIVIDUAL. MAY IT BE MARKED AS PEOPLE'S 11?

THE COURT: VERY WELL.

Q MS. NAKAKI: DO YOU SEE THAT PHOTOGRAPH, MR. ALVARADO?

A YES.

Q THAT PERSON IN THE PHOTOGRAPH WAS THE YOUNG MAN THAT ACCOMPANIED DESMOND PACHECO THE NEXT DAY TO PICK UP THE GUN, CORRECT?

A I'M NOT SURE. I NEVER REALLY SAW THE OTHER MAN. I NEVER LOOKED AT HIM BECAUSE I DIDN'T KNOW HIM.

Q WAS THE OTHER PERSON WITH DESMOND PACHECO A YOUNG MAN?

A YES.

Q WITH A SHAVED HEAD?

A NO. I THINK IT WAS KIND OF GROWN OUT.

Q THIS YOUNG MAN WAS 17 OR 18 YEARS OLD?

A HE LOOKED YOUNGER.

Q ABOUT FIVE-FOUR, FIVE-FIVE, FIVE-SEVEN, [651] SOMETHING LIKE THAT?

A I DON'T KNOW. I'M NOT SURE. I NEVER LOOKED AT HIM LONG ENOUGH.

Q THIS PERSON HAD A SHAVED HEAD WITH A LITTLE BIT OF HAIR?

A YES. IT WAS LIKE A SHAVED HEAD, BUT IT WAS GROWN OUT A LITTLE BIT.

Q AND HE WAS ABOUT 140, 150 POUNDS?

A I CAN'T REALLY TELL.

Q NO FACIAL HAIR?

A I CAN'T REMEMBER FACIAL HAIR.

Q DO YOU REMEMBER GIVING A DESCRIPTION OF THE PERSON THAT ACCOMPANIED MR. PACHECO THAT MORNING?

A NO, I DON'T REMEMBER.

MS. NAKAKI: YOUR HONOR, I'M GOING TO APPROACH WITH PAGE 267, BEGINNING ON LINE 1 THROUGH LINE 23.

THE COURT: VERY WELL.

THE WITNESS: (READING.)

Q BY MS. NAKAKI: DO YOU REMEMBER GIVING A DESCRIPTION OF THIS OTHER INDIVIDUAL THAT ACCOMPANIED MR. PACHECO TO COME TO THE HOUSE TO GET RID OF THE GUN?

A YES, I DO.

Q IT WAS SOMEBODY ABOUT 17, 18 YEARS OLD?

A HE LOOKED AROUND THAT AGE.

Q SOMEWHERE ABOUT FIVE-FOUR, FIVE-FIVE, FIVE-SEVEN?

A I GAVE THAT DESCRIPTION BECAUSE HE WAS SHORTER THAN ME.

[652] Q ABOUT 140, 150 POUNDS?

A HE WAS SKINNY.

MR. GUTIERREZ: OBJECTION; RELEVANCE.

THE COURT: OVERRULED. GO AHEAD.

Q MS. NAKAKI: MEDIUM TO LIGHT COMPLEXION?

A YES.

Q NO FACIAL HAIR?

A THAT I REMEMBER, NO FACIAL HAIR.

Q AND YOU DIRECTED DESMOND AND THIS OTHER PERSON, THIS OTHER YOUNG MAN, TO WHERE YOU HAD STASHED THE GUN BY THE ELEMENTARY SCHOOL, CORRECT?

A CORRECT.

Q AND THIS OTHER YOUNG MAN THAT WAS WITH DESMOND PICKED UP THE GUN, CORRECT?

A CORRECCT.

Q NOW, YOU HAD MENTIONED THAT THAT EVENING YOU WERE JUST WALKING AROUND THIS SHOPPING CENTER, CORRECT?

A YES.

Q BEFORE THIS INCIDENT HAPPENED, CORRECT?

A YES.

Q AND YOU WERE SOMEWHERE BETWEEN WALKING BY THE GREEN BURRITO AND THE YOSHINOYA?

A YES. I WALKED THERE AND SAT BY THE BENCHES IN BETWEEN THE GREEN BURRITO, AND I THINK IT'S A CLOTHING STORE. BUT I HAD BEEN WALKING AROUND THE WHOLE MALL.

Q THIS WAS JUST BEFORE THIS HAPPENED?

A YES. IT WAS LIKE THE WHOLE TIME WE WERE THERE BY THE PHONES.

[653] Q THIS WAS AFTER MIDNIGHT, CORRECT?

A I CAN'T BE SURE. I THINK SO.

Q A NUMBER OF THE STORES WERE CLOSED, CORRECT?

A IN THAT DIRECT AREA, MAYBE THREE OF THEM, THREE OR FOUR OF THEM.

Q YOSHINOYA WAS CLOSED, CORRECT?

A NO.

Q THIS WAS AFTER MIDNIGHT, CORRECT?

A YES.

Q -- WHEN YOU WERE WALKING AROUND?

A I BELIEVE SO.

Q AND GREEN BURRITO WAS CLOSED?

A YES. THE GREEN BURRITO WAS OPEN. I REMEMBER SEEING THE LIGHTS ON IN THERE. I ASSUME THEY WERE OPEN.

Q WERE YOU WALKING BETWEEN THE GREEN BURRITO AND YOSHINOYA, THEN?

A NO. I WAS WALKING BETWEEN THE GREEN BURRITO, AND I THINK IT'S A CLOTHING STORE.

Q AT ONE POINT YOU MENTIONED SOMETHING ABOUT WALKING TOWARDS YOSHINOYA?

A YES. WELL, EARLIER THAT NIGHT I HAD WALKED IN FRONT OF YOSHINOYA, LOOKING OUT ON TELEGRAPH.

Q AT THE TIME WHEN YOU COINCIDENTALLY WERE WALKING TOWARDS THE TRUCK WHEN MR. SOTO WAS WALKING TOWARDS THIS TRUCK, WHERE WERE YOU GOING?

A I HAD NO DESTINATION IN MIND.

Q WERE YOU WALKING -- WERE YOU GOING TO GO TOWARDS YOSHINOYA OR GO TO YOSHINOYA?

[654] A I WAS JUST WALKING AROUND.

Q JUST WALKING AROUND. OKAY. NOW, YOU HAD INDICATED THAT YOU LIVE CLOSE ENOUGH THAT YOU COULD WALK FROM MR. RIVERA'S HOUSE, CORRECT?

A YES.

Q AS A MATTER OF FACT, THE NEXT DAY, INSTEAD OF WALKING HOME FROM MR. RIVERA'S HOUSE, YOU CALLED FOR A RIDE, DIDN'T YOU?

A YES, I DID.

Q SO EVEN THOUGH IT'S WALKING DISTANCE, YOU CALLED FOR A RIDE?

A YES.

Q NOW, YOU ALSO SAID THAT YOU NEVER -- OR THAT YOU TALKED ABOUT THIS CASE OR WHAT HAD HAPPENED WITH MANUEL RIVERA; IS THAT RIGHT?

A YES, THAT'S RIGHT.

Q MANUEL IS A GOOD FRIEND OF YOURS?

A YES. WE KNOW EACH OTHER FROM SCHOOL.

Q YOU WERE LIKE THE BEST OF FRIENDS?

A WE WERE GOOD FRIENDS. WE KNOWN EACH OTHER FROM SPORTS AND FROM SCHOOL.

Q AND YOU INDICATED THAT YOU AND MR. RIVERA HAD DISCUSSED WHAT HAD HAPPENED THAT NIGHT AND SUBSEQUENT TO THAT NIGHT; IS THAT CORRECT?

A YES.

Q DO YOU RECALL WHEN DETECTIVE COMSTOCK ASKED YOU ABOUT WHO YOU DISCUSSED THIS WITH YOU SAID THAT YOU HAD NOT TALKED TO MANUEL ABOUT THIS INCIDENT SINCE IT HAPPENED?

[655] A NO, I DON'T REMEMBER THAT.

MS. NAKAKI: YOUR HONOR, I'LL SHOW THE WITNESS AND -- LET ME BACK UP.

Q HAD YOU TALKED TO ANYBODY ABOUT THIS INCIDENT ASIDE FROM MR. RIVERA?

A I DON'T THINK I HAVE, NO.

MS. NAKAKI: I'M APPROACHING THE WITNESS WITH PAGE 260.

THE WITNESS: WHAT PART?

Q BY MS. NAKAKI: GO AHEAD AND READ THE WHOLE PAGE.

A (WITNESS READING.)

Q DID YOU HAVE AN OPPORTUNITY TO REVIEW PAGE 260?

A YES, I DID.

Q WITH REGARDS TO MANUEL RIVERA, YOU TOLD THE DETECTIVE, WHEN YOU WERE ASKED WHETHER OR NOT YOU TALKED TO MANUEL ABOUT WHAT HAD HAPPENED SINCE THAT NIGHT, YOU TOLD HER, "NO, NO, WE NEVER TALK ABOUT IT," CORRECT?

A YES.

Q WAS THAT TRUE?

A YES, IT IS.

Q YOU JUST TOLD US THAT YOU DISCUSSED THIS WITH MANUEL THAT NIGHT AND SEVERAL SUBSEQUENT TIMES AFTER THAT.

A WELL, I GUESS I COULDN'T REMEMBER WHEN SHE HAD ASKED ME. I COULDN'T REMEMBER IF I TALKED TO HIM ABOUT IT.

MS. NAKAKI: YOUR HONOR, I DON'T HAVE ANYTHING FURTHER, EXCEPT I WOULD LIKE TO APPROACH WITH THE REPORTER, [656] WITH COUNSEL IN PARTICULAR, REGARDING PAGE 267 OF AN INTERVIEW.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR.)

MS. NAKAKI: YOUR HONOR, WITH REGARDS TO THE QUESTIONING ON THE SECOND INDIVIDUAL WHO ULTIMATELY TOOK THE GUN FROM THE LOCATION, THIS WITNESS EVIDENTLY IDENTIFIED THE SECOND PERSON. ALTHOUGH I COULDN'T IDENTIFY THE PHOTOGRAPH AS SHY BOY, I DON'T WANT TO ASK THIS WITNESS WHO HE KNEW HIS NAME AS BECAUSE IT WAS UNDERSTANDING NOT TO BRING HIS NAME IN.

THE PROBLEM IS HE CAN AT LEAST IDENTIFY HIM THROUGH THIS MONIKER AND COINCIDENTLY, ROLAND MACIAS' MONIKER IS SHY BOY. I DON'T KNOW HOW THE COURT PROPOSES HOW I CAN ASK IN A WAY -- I CAN SAY, WELL, YOU KNEW THIS PERSON BY --

MR. GUTIERREZ: MAYBE AFTER I FINISH MY CROSS WE CAN FIGURE OUT A WAY TO MENTION IT.

MR. BERNSTEIN: I DON'T THINK IT MEANS ENOUGH NO MATTER WHAT YOU DO, BECAUSE THE WAY I INTERPRET IT FROM WHAT I UNDERSTAND YOUR OFFER OF PROOF IS, IS FOUR DAYS LATER MR. MACIAS, ALSO KNOWN AS SHY BOY, IS ARRESTED WITH WHAT TURNS OUT TO BE EXHIBIT 3. THAT STILL MAKES NO NEXUS THAT EXHIBIT 3 IS IN FACT THE GUN THAT MR. MACIAS PICKED UP FROM THE PEOPLE OR THAT THE PEOPLE USED IN THE CRIME.

MR. GUTIERREZ: MR. MACIAS GIVES AN INTERVIEW ABOUT [657] THE GUN, SAYING WHERE HE GOT IT, WHO HE GOT IT FROM. IF THEY ARE GOING TO BRING IN MR. MACIAS BUT TO IDENTIFY THAT GUN, THAT'S FINE. BUT NOBODY HAS IDENTIFIED THAT GUN. MY CLIENT THOUGHT IT WAS A LITTLE BIGGER THAN THAT. NOBODY HAS POSITIVELY IDENTIFIED THAT GUN. CERTAINLY, MR. MACIAS HAS NEVER IDENTIFIED THAT GUN. IN FACT,

MY UNDERSTANDING IS WHEN HE SAID WHO HE GOT IT FROM, WHEN HE BOUGHT IT, AND WHERE, IT WASN'T THIS CASE.

THE COURT: ALL RIGHT. AT THE PRESENT TIME I'M NOT GOING TO ALLOW YOU TO GET INTO THAT LINE OF QUESTIONING. ALSO, I SHOULD INDICATE THE RECORD IS IN THE LAST SIDEBAR WE HAD.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

MS. NAKAKI: THANK YOU, YOUR HONOR. NOTHING FURTHER.

THE COURT: DO YOU WANT TO -- HOW LONG?

MR. GUTIERREZ: YOUR HONOR, I'LL TRY TO BE BRIEF. FIFTEEN, TWENTY MINUTES.

THE COURT: LET'S GO AHEAD AND TAKE OUR AFTERNOON BREAK. PLEASE REMEMBER MY ADMONITIONS TO YOU, THOUGH. TWENTY MINUTES.

(AT 2:50 P.M. THE JURY WAS EXCUSED FOR A RECESS UNTIL 3:15 P.M.)

THE COURT: ARE WE READY FOR THE JURY?

[658] MR. GUTIERREZ: I THINK WE HAVE A 402.

MS. NAKAKI: IT WOULD BE IN REGARDS TO POTENTIAL REBUTTAL BY THE PEOPLE. YOUR HONOR, AT THIS POINT, HAVING HEARD MR. ALVARADO'S TESTIMONY REGARDING MR. PACHECO AND A SECOND INDIVIDUAL RETURNING TO THE HOUSE THE NEXT DAY TO PICK UP A GUN, THE PEOPLE INTEND TO CALL AS REBUTTAL A MR. DESMOND PACHECO BECAUSE THE PEOPLE ANTICIPATE THAT HE WILL TESTIFY THAT HE DID GO

BACK THE NEXT DAY WITH A ROLAND MACIAS TO MR. RIVERA'S HOUSE.

HOWEVER, MR. PACHECO HAD BEEN INTERVIEWED BY MY OFFICE OR MYSELF TODAY AND HE WILL BASICALLY TESTIFY THAT HE DID GO BACK TO THE HOUSE WITH ROLAND MACIAS TO MR. RIVERA'S HOUSE BUT NOBODY WAS HOME AND THEY WENT TO GO PLAY HANDBALL.

THE RELEVANCE IS THAT WE NOW KNOW WHO THE SECOND PERSON IS THAT GOES BACK TO MR. RIVERA'S HOUSE BASED ON WHAT MR. ALVARADO STATED, THAT MR. PACHECO DID GO BACK TO THE HOUSE. SUBSEQUENT TO THIS EVENT, FOUR DAYS LATER, MR. MACIAS, THE SECOND PERSON, IS ARRESTED WITH PEOPLE'S 3.

A DEPUTY HOLSTON WILL BE CALLED TO TESTIFY BECAUSE HE IS THE ARRESTING DEPUTY AND CAN TELL YOU THAT PEOPLE'S 3 WAS THE GUN

IN THE POSSESSION OF MR. MACIAS FOUR DAYS LATER.

THE COURT: DO YOU HAVE ANYTHING THAT CONNECTS UP THAT GUN WITH THIS SHOOTING?

MS. NAKAKI: INFERENTIALLY.

THE COURT: BALLISTICS?

MS. NAKAKI: NO.

[659] MR. GUTIERREZ: IF I MAY POINT OUT, YOUR HONOR, I FELT MR. PACHECO PROBABLY SHOULD HAVE A LAWYER. ACCORDING TO MR. ALVARADO, HE CAME BACK WITH ANOTHER INDIVIDUAL TO PICK UP THE GUN.

I THINK MS. NAKAKI BELIEVES MR. PACHECO ACTUALLY DID IN FACT COME BACK TO PICK UP THE GUN EVEN THOUGH HE'S GOING TO TESTIFY THAT HE WENT TO PLAY HANDBALL. THEREFORE, HE'S COMMITTING PERJURY. IF HE'S NOT COMMITTING PERJURY, THEN HE WENT TO PICK UP THE GUN.

HE'S AN EYEWITNESS TO A HOMICIDE, AND HE GOES TO PICK UP THE GUN AND TAKE IT AWAY. THAT IS DEFINITELY A P.C. 32. SO EITHER HE'S A P.C. 32 BECAUSE HE'S AN EYEWITNESS TO A SHOOTING AND GOES AND PICKS UP THE GUN THE NEXT DAY OR, TWO, HE'S LYING ABOUT IT ON THE WITNESS STAND, POSSIBLY LYING ABOUT IT BY DENYING IT. SO CERTAINLY THAT OPENS THE DOOR FOR POSSIBLE PROSECUTION, AND HE SHOULD HAVE THE BENEFIT OF COUNSEL.

MOST IMPORTANTLY, THIS MAN, MR. MACIAS, IS ARRESTED FOUR DAYS LATER WITH THE GUN. THERE IS NOTHING TO LINK THIS GUN TO THIS CRIME, NO BALLISTICS, PRINTS, ANYTHING OF THAT SORT, AND MR. MACIAS DESCRIBES WHERE HE GOT THE GUN FROM, WHO HE GOT THE GUN FROM, AND IT HAS NOTHING TO DO WITH THIS CASE. HE INDICATES HE PURCHASED IT FROM A MALE, BLACK. AND I

BELIEVE I READ -- THE REPORTS AS WELL STATES THAT HE BOUGHT IT, I THINK, AT A PARK OR SOMETHING LIKE THAT.

THE COURT: MR. BERNSTEIN.

MR. BERNSTEIN: JOIN, YOUR HONOR. I THINK IT'S BEEN AMPLY COVERED BEFORE THE COURT.

[660] THE COURT: IF THAT'S THE EXTENT OF THE REBUTTAL, THAT REQUEST IS DENIED.

MS. NAKAKI: THANK YOU, YOUR HONOR.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: GOOD AFTERNOON, LADIES AND GENTLEMEN.

MR. GUTIERREZ, GO AHEAD.

+REDIRECT EXAMINATION

BY MR. GUTIERREZ:

Q MICHAEL, I'M GOING TO ASK YOU A FEW QUESTIONS ABOUT SOME OF THE QUESTIONS YOU'VE BEEN ASKED ABOUT EARLIER THIS MORNING AND LATER THIS AFTERNOON, OKAY?

A OKAY.

Q THERE WAS A PORTION OF THE TAPE PLAYED TO YOU, AND YOU DISCUSS THAT. I WOULD LIKE TO JUST GO A LITTLE FURTHER, A FEW LINES MAYBE.

(WHEREUPON A PORTION OF PEOPLE'S 8, AN AUDIO TAPE, WAS PLAYED.)

MR. GUTIERREZ: I'M SORRY, YOUR HONOR. APPARENTLY MY CUE IS OFF. WELL, I'LL JUST FORGET THAT. I'LL GO FROM THE TRANSCRIPT. THE

LAST PORTION OF THE TAPE BEING PLAYED, THERE'S A DESCRIPTION GIVEN ABOUT WHAT MIGHT HAVE OCCURRED ON THE OTHER SIDE OF THE LOCATION.

[661] Q YOU WERE ASKED, DO YOU RECALL WHETHER OR NOT THE MAN WHO HAD THE GUN USED THE LEFT HAND OR RAISED HIS RIGHT HAND; IS THAT CORRECT?

A YES.

Q WERE YOU ABLE TO SAY WHICH HAND IT WAS?

A NO, I DON'T THINK I WAS.

Q WHY IS IT THAT YOU WERE UNABLE TO SAY WHICH HAND THE PERSON WITH THE GUN USED WHEN HE GOT -- WHETHER IT WAS THE LEFT OR RIGHT HAND RAISED?

A BECAUSE I NEVER SAW -- I NEVER REALLY LOOKED ON THAT SIDE OF THE TRUCK.

Q WHAT WAS THE LIGHTING LIKE BACK ON THE 23RD AROUND MIDNIGHT? REFERRING TO DEFENSE DOUBLE "E," WHAT WAS THE LIGHTING LIKE ON THE WEST SIDE OF THE DUMPSTER, BASICALLY NORTH OF THE VEHICLE -- SOUTH OF THE VEHICLE?

A I DON'T BELIEVE THERE'S ANY LIGHTING OUT THERE. MAYBE LIKE A STREETLIGHT, BUT FURTHER DISTANCE. MORE CLOSER TO THE STORES.

Q IS IT, SAY, A DARK AREA?

A YES, IT'S A DARK AREA RIGHT THERE.

Q NOW, THIS NIGHT THAT THIS INCIDENT OCCURRED, DO YOU KNOW IF THERE WERE OTHER STORES OPEN IN THE MALL?

A YEAH. I BELIEVE MAYBE CLOSE TO HALF WERE STILL OPEN.

Q WHAT KIND OF STORES WERE OPEN?

A MOSTLY ALL THE FOOD STORES EXCEPT, I THINK, THE GREEN BURRITO. I THINK THERE WAS A PAGER PLACE. I DON'T KNOW IF THEY WERE STILL OPEN, BUT THE LIGHTS WERE ON

[662] Q WHAT ABOUT TACO BELL OR --

A NO.

Q BUT THERE WERE SOME BUSINESSES OPEN?

A YES, THERE WERE.

Q WAS THERE CARS IN THE LOT OF THE MALL?

A YES, THERE WERE SOME.

Q WERE THERE PEOPLE IN THE MALL?

A YES.

Q PEOPLE WALKING?

A YEAH. BY THE OPEN STORES, YES, THERE WERE.

Q OTHER PEOPLE DRIVING IN THE MALL?

A THERE WAS SOME DRIVING BY.

Q WERE THERE CARS PARKED IN THE PARKING LOT AREA OF THE MALL?

A THERE WERE SOME, YES.

Q WHAT ABOUT THE DONUT STORE? OTHER THAN THE SMALL GROUP OF PEOPLE THAT WERE THERE THAT CAME FROM MANUEL'S HOUSE, WERE THERE OTHER PEOPLE IN THE DONUT STORE THAT MAYBE HAD NOT BEEN IN MANUEL'S HOUSE THAT YOU DID NOT KNOW?

A YES, I BELIEVE THERE WERE. I BELIEVE THERE WERE TWO, THREE PEOPLE.

Q SO PORTIONS OF THE MALL WAS OPEN FOR BUSINESS. THERE WAS PEDESTRIAN TRAFFIC, THERE WAS VEHICULAR TRAFFIC, THINGS OF THAT SORT?

A YES.

Q YOU WERE ASKED ABOUT A HONDA, AND YOU DON'T RECALL A HONDA; IS THAT CORRECT?

[663] A THAT'S CORRECT.

Q AND ABOUT WHETHER VALERIE FLAGGED SOMEONE DOWN, YOU DIDN'T RECALL VALERIE FLAGGING SOMEONE DOWN?

A NO. I DON'T REMEMBER SEEING THAT.

Q WHERE DO YOU THINK YOU WERE -- EXCUSE ME. WERE YOU WITH VALERIE ALL THE TIME?

A NO. I HAD BEEN WALKING AROUND. AND I CAN'T REALLY REMEMBER, BUT I KNOW I HAD GONE TO THE DONUT SHOP EARLIER THAT DAY, I THINK. I DON'T REMEMBER IF I WENT IN THERE OR NOT.

Q BUT IF YOU HAD SEEN VALERIE FLAG A MAN DOWN AND GO OVER AND TALK TO HIM AND GET MONEY FROM HIM, SOMETHING, YOU WOULD HAVE REMEMBERED?

A YES. THAT'S SOMETHING I WOULD HAVE REMEMBERED.

Q ESPECIALLY IF IT WAS THE WHITE TRUCK DEPICTED IN DEFENSE DOUBLE "E"?

A YES. I WOULD HAVE REMEMBERED.

Q SO I TAKE IT YOU WEREN'T REALLY MONITORING VALERIE 100 PERCENT OF THE TIME?

A NO, I WAS NOT.

Q WHAT ABOUT MANUEL? WERE YOU MONITORING OR PAYING ATTENTION TO HIM 100 PERCENT OF THE TIME?

A NO, I WAS NOT.

Q WHAT ABOUT PACHECO?

A NO, I WAS NOT.

Q WHAT ABOUT MR. SOTO?

A NO, I WAS NOT.

[664] Q NOW, THE -- THERE WAS SOME PORTIONS OF A TAPED INTERVIEW THAT HAD BEEN PLAYED TO YOU, AND SOME PORTIONS HAVE BEEN PLAYED TO THE JURY. THE ACTUAL INTERVIEW WAS OVER TWO HOURS?

A YES, IT WAS.

Q AT TIMES WHEN YOU WERE ASKED A QUESTION THERE ARE PAUSES. FOR EXAMPLE, A PORTION THAT WAS READ EARLIER AND SOMETIMES YOU PRECEDE A QUESTION WITH "UM," AND YOU PAUSE.

IS THERE ANY REASON WHY YOU ARE PAUSING OR "UM" WHEN YOU'RE TRYING TO --

A JUST RE- -- WERE TRYING TO REMEMBER. I COULDN'T REMEMBER. TRYING TO THINK.

Q FOR EXAMPLE, YOU WERE ASKED TO DESCRIBE WHERE THE GUN MAY HAVE COME FROM, AND YOU INDICATE YOU DON'T KNOW IF IT'S FROM THE LEFT, THE RIGHT, THE FRONT, THE WAIST, FROM THE BACK. DID YOU KNOW WHERE THE GUN CAME FROM?

A NO, I DID NOT.

Q DID YOU SEE IT BEING PULLED OUT?

A NO.

Q WAS THE GUN EVER PULLED OUT AND SHOWN TO YOU LIKE THIS, HELD IN THEIR HAND AND SHOWN TO YOU?

A NO, IT WAS NOT.

Q HOW WAS THE GUN SHOWN TO YOU?

A LIKE A QUICK FLASH, MAYBE, ON THE SIDE OF THE LEG, OR JUST A FEW SECONDS MAYBE.

Q THERE WAS A PORTION OF THE TAPE THAT WAS PLAYED. I WOULD LIKE TO READ THE FOLLOWING TWO LINES, PAGE [665] 241:

"Q SO DID HE HAVE IT OUT JUST LIKE A SECOND, JUST ENOUGH TO FLASH IT?

"A HE -- HE JUST LIKE, JUST ENOUGH TO SHOW."

HOW WAS IT SHOWN? WHY DON'T YOU STAND UP AND MAYBE SHOW US WITH YOUR HAND?

A WELL, I BELIEVE IT WAS JUST -- I DON'T KNOW WHERE IT CAME FROM ON HIM OR ANYTHING,

BUT IT SEEMED LIKE IT WAS JUST SOMETHING LIKE THAT (INDICATING).

MR. GUTIERREZ: YOUR HONOR, HE'S GOT THE PALM OF HIS HAND, AND HE OPENS IT TO THE RIGHT AND TURN IT BACK DOWN.

Q BY MR. GUTIERREZ: YOU CAN SIT DOWN.

DID YOU GET A CLEAR PICTURE?

A NO, I DID NOT.

Q NOW, LATER ON THAT EVENING, YOU AND MANUEL WERE HOME AT MANUEL'S HOUSE AFTER THE INCIDENT?

A YES, WE WERE.

Q WAS MANUEL UPSET?

A YES, HE WAS.

Q WERE YOU UPSET?

A YES, I WAS.

Q DID YOU GUYS DISCUSS ANYTHING ABOUT THE SHOOTING, OR DID YOU TRY TO IGNORE IT?

A WE HAD DISCUSSED A LITTLE BIT OF IT.

Q A LITTLE BIT?

A YES.

Q PRETTY TRAUMATIC INCIDENT, CORRECT?

[666] A YES, IT WAS.

Q AND DID MANUEL WANT THE GUN IN HIS HOUSE?

A NO, HE DID NOT.

Q WAS THE GUN TAKEN SOMEPLACE?

A YES. HE WAS REALLY WORRIED ABOUT HAVING IT AROUND WITH HIS YOUNGER BROTHERS AND SISTERS THERE.

Q AND WHEN YOU AND MANUEL WENT TO TAKE THE GUN AND PUT IT IN THE BUSHES, WERE THERE POLICE ON THE STREETS?

A YES, THERE WAS.

Q WERE THERE HELICOPTERS ON THE STREETS?

A I BELIEVE THERE WAS, YES.

Q WHEN YOU RAN BACK TO MANUEL'S HOUSE AFTER THE SHOTS WERE FIRED, WERE THERE POLICE CARS AT THE SUBSTATION?

A YES. THE SAME CAR THAT WAS THERE EARLIER WAS IN THE SAME SPOT WITH THE, I GUESS, PATROLMAN STILL OUTSIDE OF THE CAR TALKING TO THE SHERIFFS INSIDE.

MR. GUTIERREZ: I FOUND THAT PORTION OF THE TAPE, YOUR HONOR, 247.

Q WHEN YOU WERE ASKED ABOUT HOW FAR SOMEONE MIGHT HAVE BEEN.

"Q COULD YOU TELL IF PAUL RAISED HIS RIGHT ARM OR LEFT ARM?

"A NO, I -- I COULDN'T SEE THAT.

"Q SO YOU COULD NOT SEE WHICH ARM PAUL RAISED?

"A NO."

IS THAT WHAT YOU SAID?

A YES, I DID.

[667] Q WERE YOU ABLE TO SEE FROM THAT SIDE OF THE TRUCK?

A NO, I WAS NOT ABLE TO.

Q YOU INDICATE IN THE TAPE THAT YOU WAITED ABOUT 10 TO 15 SECONDS BEFORE YOU REALIZED WHAT HAPPENED. WHAT DID YOU MEAN BY THAT?

A WELL, I DIDN'T KNOW WHAT WAS TAKING PLACE ON THE OTHER SIDE OF THE TRUCK. AND BY THE TIME I HAD REALIZED AND TOOK NOTICE OF WHAT THE NOISE WAS, I FINALLY STOOD UP AND SEEN EVERYBODY RUNNING.

Q WHEN EVERYBODY RAN, WHAT DID YOU DO?

A I WAITED ANOTHER FIVE SECONDS. I WAS NOT SURE WHAT TO DO. AND THEN I FINALLY

STARTED WALKING AWAY AND THEN STARTED RUNNING WHEN I REALIZED EVERYBODY WAS GONE.

Q HOW DID YOU FEEL ABOUT WHAT HAD HAPPENED?

MS. NAKAKI: OBJECTION, YOUR HONOR; IRRELEVANT.

THE COURT: SUSTAINED.

Q BY MR. GUTIERREZ: YOU WERE ASKED -- A PORTION OF THE TAPE WAS PLAYED REGARDING YOUR CONSUMPTION OF ALCOHOL. I WOULD LIKE TO GO ON TO TWO OTHER LINES ON 228. TO PUT IT IN CONTEXT, I'LL READ THE PORTIONS THAT WERE PLAYED.

"Q WERE YOU A LITTLE BUZZED?

"A A LITTLE BIT.

"Q YOU LOOK KIND OF STUPID, NOT REALLY SURE WHAT YOU WERE DOING?

"A NO, I WASN'T -- I WASN'T ANYTHING, STUPID, OR -- I WAS BUZZED AND HAD BEEN GIGGLING [668] AND ALL THAT, BUT -- "

Q HAD YOU BEEN DRINKING THAT NIGHT?

A YES, I WAS.

Q DID YOU GET DRUNK THAT NIGHT?

A YES, I WAS.

Q DID YOU KNOW WHAT YOU WERE DOING?

A YES.

Q AND YOU WERE ASKED THESE QUESTIONS AND THE TAPE IS PLAYED:

"Q DID YOU HEAR WHAT WAS SAID BETWEEN THE TWO OF THEM?

"A NO.

"Q COULD YOU HEAR WORDS WERE BEING SAID?

"A NO."

DID YOU HEAR ANY CONVERSATION ON THE OTHER SIDE OF THE TRUCK?

A NO, I DID NOT.

Q DID PAUL SAY ANYTHING TO YOU IMMEDIATELY BEFORE GOING TO THE OTHER -- BEFORE GOING TO THE TRUCK?

A NO, HE DID NOT.

Q DID YOU SAY ANYTHING TO THE MAN?

A NO.

Q DID YOU SAY ANYTHING TO PAUL BEFORE HE WALKED OVER TO THE DRIVER'S SIDE OF THE CAR?

A NO, I DID NOT.

Q DID YOU SAY ANYTHING TO PAUL THERE THAT NIGHT?

A NO.

[669] Q WHAT ABOUT AT THE PARTY?

A NO.

Q WHERE WERE YOU AT THE PARTY?

A IN THE ROOM. BUT I WAS MORE TALKING WITH MANUEL AND THEM.

Q WHERE WAS PAUL?

A IN THE ROOM ALSO, BUT I THINK HE WAS WITH VALERIE AND DESMOND.

Q NOW, YOU WERE ASKED ABOUT THE TOWN CENTER EARLIER THAT DAY, HOW MANY KIDS GO TO THE TOWN CENTER. BY "KIDS" -- EXCUSE THE TERM -- YOUNG PEOPLE?

A THERE ARE A LOT. A LOT OF PEOPLE GO THERE.

Q LIKE ABOUT HOW MANY?

A FOR SURE OVER FIFTY MAYBE. FIFTY, SIXTY PEOPLE GO.

Q NOW, WHEN THE MAN, MR. SOTO, WALKED OVER TOWARDS THE TRUCK, DID YOU SEE A GUN IN HIS HAND?

A NO, I DID NOT.

Q WERE YOU EVER SIDE BY SIDE WITH HIM AS HE WAS WALKING TO THE TRUCK?

A NO.

Q WERE YOU EVER AHEAD OF HIM?

A NO.

Q WERE YOU EVER PARALLEL WITH HIM?

A NO.

Q AND MY LAST WORDS TO YOU ARE -- MY LAST QUESTION TO YOU IS A PORTION OF THE TAPE THAT MS. NAKAKI PLAYED:

[670] "Q DID YOU SAY ANYTHING TO PAUL?

"A NO, I DIDN'T.

"Q DID YOU ENCOURAGE PAUL TO DO WHAT HE WAS DOING?

"A NO, I DID NOT."

MS. NAKAKI: YOUR HONOR, OBJECT. THIS IS NOT A QUESTION.

MR. GUTIERREZ: IT'S FOUNDATION TO A QUESTION.

THE COURT: PROCEED.

MR. GUTIERREZ: (READING):

"Q DID YOU ENCOURAGE PAUL TO DO WHAT HE WAS DOING?

"A NO, I DID NOT. I HAD NO IDEA WHAT WAS GOING ON ON THE OTHER SIDE."

Q BY MR. GUTIERREZ: DO YOU REMEMBER ANSWERING THAT QUESTION?

A YES, I DO.

Q WAS THAT TRUE?

A YES, IT WAS.

MR. GUTIERREZ: NO FURTHER QUESTIONS.

THE COURT: MS. NAKAKI.

MS. NAKAKI: NO QUESTIONS.

THE COURT: MR. BERNSTEIN.

MR. BERNSTEIN: NO QUESTIONS.

THE COURT: ALL RIGHT. YOU CAN STEP DOWN.

MR. GUTIERREZ.

MR. GUTIERREZ: THANK YOU, YOUR HONOR. YOUR HONOR, THE DEFENSE WOULD REST.

Supreme Court, U.S.
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(4)

No. 02-1684

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether a state court adjudication can be deemed an "objectively unreasonable" application of clearly established Supreme Court law, for purposes of 28 U.S.C. § 2254(d), because it does not "extend" Supreme Court precedent to a new context.

2. Whether, in applying the objective test for a "custody" determination under *Miranda v. Arizona*, 384 U.S. 436 (1966), a court must consider the age and experience of a person if he or she is a juvenile.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1684

MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Alvarado v. Hickman*, 316 F.3d 841 (CA9 2002), *amended* (2003), and is reproduced in the appendix to the petition for writ of certiorari. Pet. App. A1-A30.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was amended and entered on February 11, 2003. The Court of Appeals denied Warden Yarborough's petition for rehearing and suggestion for rehearing en banc on February 11, 2003. Pet. App. A5. The petition for writ of certiorari was filed on May 12, 2003, and was granted on September 30, 2003. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

(stating in support of the habeas reform in AEDPA, "Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to relitigate claims already considered and rejected by the State courts."); *Lockyer v. Andrade*, 123 S. Ct. at 1172.

This Court has recognized that the *Teague* "new rule" proscription is violated where "a prior decision is applied in a *novel setting*, thereby extending the precedent," or where an old rule is applied "*in a manner* that was not dictated by precedent." *Stringer v. Black*, 503 U.S. 222, 228 (1992) (emphasis added). For example, in *Butler*, 494 U.S. at 411, 415, this Court refused to retroactively extend, "in the context of a separate investigation," the earlier *Edwards v. Arizona* holding prohibiting re-initiation of police interrogation after a suspect invokes his *Miranda* right to counsel—even though in the meantime the Court in the direct-review case of *Arizona v. Roberson* indeed had prospectively extended the *Edwards* rule to that same new context. The *Butler* Court rejected the prisoner's argument that *Roberson* had not created a new rule but had merely applied the *Edwards* rule to a slightly different set of unique facts. *Id.* at 409, 414-15.

Similarly, in *Caspari v. Bohlen*, 510 U.S. 383, 396-97 (1994), this Court held that it would violate *Teague* to extend the "old rule" of *Bullington v. Missouri*—prohibiting a second capital sentencing hearing after the jury once had rejected the death penalty—into the different context of a second non-capital hearing for persistent-offender sentencing after the State at the first hearing had failed to prove facts showing the defendant's recidivist status. In this Court's phrase, extending the rationale of a legal principle, even if by only a "short step," amounts to an impermissible new rule of constitutional law under *Teague*. *Caspari*, 510 U.S. at 396-97.

Another of this Court's cases in the *Teague* line, *Sawyer v. Smith*, 497 U.S. at 236, illustrates another approach that may be taken in pinpointing clearly established Supreme Court law by viewing the nature of the legal ground addressed. In *Sawyer*,

the petitioner sought to rely on a series of earlier Supreme Court precedents as establishing the specific rule eventually recognized in *Caldwell v. Mississippi* prohibiting prosecutorial argument that misleads capital sentencing jurors into believing that someone else might make the ultimate sentencing choice. *Sawyer*, 497 U.S. at 232-33. The earlier series of precedents had invalidated sentencing schemes that prohibited consideration of mitigating evidence, while *Caldwell* quite differently invalidated a prosecutor's argument to the jury. *Sawyer*, 497 U.S. at 236. The underlying legal grounds thus were different. As the *Sawyer* Court stated, "[t]hese cases do not speak to the issue we decided in *Caldwell*." *Id.*

In addition, *Sawyer* noted that, "prior to *Caldwell* our cases did not put other courts on notice that the Eighth Amendment compelled the *Caldwell* result." 497 U.S. at 237. This notice element is also important under § 2254(d). Just as with *Teague*, requiring state courts to anticipate "extensions" of Supreme Court rules to novel contexts would defeat AEDPA's goal of providing notice to the state courts of the rules they must apply, i.e., the "clearly established" rules in United States Supreme Court precedents.

The "clearly established Federal law" provision of § 2254(d), of course, does not cut back on the protections that the *Teague* doctrine affords to final state court judgments. Indeed, it strengthens *Teague*-type protections. For § 2254(d)(1), in limiting clearly established law to that "determined by the Supreme Court of the United States," further limits the source of clearly established law to the holdings of this Court rather than the interpretative jurisprudence of other state or federal courts. *Williams*, 529 U.S. at 412.

In *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001), this Court interpreted the reference in AEDPA's successive petition provision to "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" to mean

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be compelled in any criminal case to be a witness against himself * * * *

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States * * * *

STATEMENT OF THE CASE

After midnight on September 22, 1995, respondent Michael Alvarado, Paul Soto, and others went to a shopping mall in Santa Fe Springs, California. They saw a truck driven by Francisco Castaneda. One person in Alvarado's group approached Mr. Castaneda and obtained a dollar from him. In Alvarado's presence, Soto said, "Let's jack," meaning that they should steal the truck. Soto walked to the driver's side of the truck, while Alvarado walked towards the passenger door. A gunshot and a scream followed. Mr. Castaneda was later found dead from a bullet wound. *See* Pet. App. C3-C4.

Approximately one month after the crime, Los Angeles County Sheriff's Detective Cheryl Comstock left word at Alvarado's house and with his mother at her workplace that the Sheriff's Department wanted to speak with Alvarado. Alvarado's mother told the detective that Alvarado's father would bring Alvarado to the Sheriff's station so he could be interviewed. Both parents went with Alvarado to the Sheriff's station and gave their permission for Detective Comstock to interview him. J.A. 72.

Alvarado was over seventeen and a half years old at the time of the interview. J.A. 344. The interview was conducted exclusively by Detective Comstock. J.A. 72. She did not tell Alvarado that he was under arrest, and she did not give him *Miranda* warnings. J.A. 72-165.

Alvarado's initial version of events omitted any mention of the crimes. Detective Comstock expressed her disbelief of Alvarado's story. Alvarado repeated his statement that he had seen no shooting. J.A. 101. Detective Comstock informed Alvarado that she had witnesses who said "quite the opposite," and that she had "three notebooks full of notes." J.A. 101-02. She urged him to tell the truth. J.A. 102. However, she never instructed him that he would have to remain in the Sheriff's station until he told the truth. *See* J.A. 72-165. Eventually, Alvarado gave further details of the crime. He described his role in hiding the gun after the murder and identified Soto as the shooter. J.A. 109-49.

At one point during the interview, Detective Comstock asked Alvarado where he was going after the interview. J.A. 122-23. Detective Comstock stopped the interview once to use the bathroom. J.A. 135. Near the end of the interview, the detective offered the use of a telephone to Alvarado, but he declined it. J.A. 149-50. Also near the end of the interview, Detective Comstock indicated that Alvarado would be allowed to return home after the interview. J.A. 150. Shortly thereafter, he was also offered an opportunity to take a bathroom break or water break, which he also declined. Detective Comstock said:

that the Supreme Court is the only entity that can make a new rule retroactive. This Court explained:

> The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.

Id. at 663. This Court further explained that the word "made" was analogous to the word "determined" in § 2254(d)(1)'s reference to "clearly established Federal law, as determined by the Supreme Court of the United States," in that both phrases refer to the holdings of the Supreme Court's decisions. *Id.* at 664. Under *Tyler*'s reasoning, when a lower court extends this Court's precedents to infer a rule that this Court itself has not held to be the rule, it cannot be said that the extended rule is "clearly established Federal law, as determined by the Supreme Court."

To allow a final state conviction to be overturned whenever a lower federal habeas court infers an extension of Supreme Court precedent would defeat Congress's evident purpose in limiting the basis for collateral attacks to the holdings actually articulated by this Court. Here, for example, the Ninth Circuit defended the challenged extension of this Court's precedent; but it was the Ninth Circuit itself that fashioned the extension. "Clearly established Federal law, as determined by the Supreme Court," however, does not embrace unannounced Supreme Court "holdings" that lower federal courts might construct or perceive in their own view of the law.

Extending Supreme Court precedent to a new context is inconsistent with the concept of clearly established Supreme Court law because it is outside of this Court's holdings. Just as *Butler*, *Caspari*, and *Sawyer* refused to allow an extension of

precedent under *Teague*, an extension of a Supreme Court holding into a new context cannot be "clearly established Federal law, as determined by the Supreme Court" under § 2254(d).

B. A State Court Adjudication That Declines To Extend Supreme Court Precedent To A Novel Setting Cannot Be "Contrary To" Clearly Established Federal Law As Determined By The Supreme Court

Even if the "clearly established Federal law, as determined by the Supreme Court" provision did not settle the issue of whether § 2254(d) allows relief for so-called unreasonable failures to extend Supreme Court precedent, the "contrary to" and "unreasonable application" provisions of the statute combine with it so as to leave no room for relief on such a theory.

After a federal habeas court has identified the "clearly established" Supreme Court law, the court must determine whether the state court's adjudication was "contrary to" it. The "contrary to" clause of § 2254(d) makes the writ available if the state court arrived at a conclusion opposite to that reached by this Court on a question of law or if the state court decided the case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 412-13. The "contrary to" exception in this way ensures that the state courts enforce the holdings of Supreme Court decisions, even in cases presenting somewhat different facts and circumstances, as long as the new facts and circumstances are materially the same as what this Court's holding contemplated.

Under this Court's definition, however, a state court adjudication that forgoes extending a legal principle into a new context cannot be "contrary to" clearly established Supreme Court precedent. For an adjudication that does not "extend"—i.e., change—clearly established law cannot contradict or be "opposite" to a conclusion on a question of law

"Okay. If you do, just say so and we'll stop." J.A. 151. The interview lasted approximately two hours, from 12:30 to 2:30 in the afternoon. J.A. 72, 165. Alvarado returned home after the interview. J.A. 165.

Approximately two months later, the decision was made to charge Alvarado with Mr. Castaneda's murder and attempted robbery. Detective Comstock told Alvarado's parents that a warrant had been issued for Alvarado's arrest. Alvarado turned himself in at the Sheriff's station. J.A. 354-55; Pet. App. C15.

Prior to trial, Alvarado moved to exclude evidence of his statements to Detective Comstock. He argued that he should have been interviewed in his parents' presence. He also argued that the interview was a custodial interrogation and that he should have been advised of his constitutional rights under *Miranda*. *See* J.A. 169, 185-92, 194-96. The prosecution opposed the motion, arguing that *Miranda* advisements were not required because Alvarado was not in custody during the interview. J.A. 192-94. Following a hearing, the trial court denied Alvarado's motion to exclude his statements. J.A. 169, 185-97. An edited tape of his statements during the interview was played at trial. J.A. 334-39. Alvarado was convicted of murder and attempted robbery and was sentenced to state prison for a term of fifteen years to life. Pet. App. C5.

Alvarado appealed his convictions. He argued, again, that his statements should have been excluded because he was subjected to a custodial interrogation without being advised of his *Miranda* rights. Pet. App. C11. The California Court of Appeal rejected this claim. Pet. App. C11-C17. The court cited the facts that Alvarado was not told he could not leave until he told the truth, and that he was not subjected to intense and aggressive tactics. The court noted that, although Detective Comstock made it clear to Alvarado that she disbelieved his early, exculpatory version of the events on the night of the murder, she did not fabricate evidence or subject him to intense pressure. The court found that Alvarado was not in custody during his interview with Detective Comstock, and therefore

concluded that no *Miranda* warnings were required. Pet. App. C17. Alvarado's petition for review in the California Supreme Court was denied. J.A. 16.

Alvarado filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Central District of California. The petition alleged that his statements were obtained in violation of *Miranda* because he was objectively in custody at the time of his police interrogation but was not given any *Miranda* advisements. J.A. 17-71. The magistrate judge issued a report recommending that the petition be denied with prejudice. The magistrate judge found that Alvarado had not been in custody during the interview and that his statements were properly admitted. The magistrate judge concluded that the California court's rejection of Alvarado's claim therefore precluded relief under § 2254(d) because the state court ruling was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. Pet. App. B1-B8. The District Court filed an order adopting the findings, conclusions, and recommendations of the magistrate judge, and entered judgment denying the petition and dismissing it with prejudice. Pet. App. B9-B10.

Alvarado appealed. In a published decision, the Ninth Circuit held that a defendant's juvenile status alters the "in custody" determination for *Miranda* purposes. Pet. App. A1-A30. The Ninth Circuit acknowledged, however, that no Supreme Court case had required a juvenile's age and experience to be considered for a "custody" determination. Pet. App. A6, A22. But, it stated that Supreme Court cases had held that a juvenile is more susceptible to police coercion during a custodial interrogation than would be a similarly-situated adult. Pet. App. A17-A18. The court reasoned that, if the age and circumstances of a juvenile defendant are relevant factors in determining whether a confession or a waiver of constitutional rights are voluntarily given, there was "no principled reason why similar safeguards * * * would not apply equally to an 'in custody' determination." Pet. App. A18-A19. The Ninth

Circuit held that relief was available despite § 2254(d) because the state court's failure to address how Alvarado's juvenile status affected the "in custody" determination amounted to an unreasonable application of clearly established federal law. Pet. App. A22-A26.

The court further held that Alvarado had been "in custody." In determining that he was in custody, the court considered the additional factors of Alvarado's age, his lack of prior arrest history, his inexperience with law enforcement officers, the parental involvement in arranging for his interview, and Detective Comstock's alleged refusal to let his parents attend the interview. Pet. App. A20, A25-26. The Ninth Circuit also held that the improper admission of the incriminating statements by the state court had a substantial and injurious effect on the subsequent jury verdict. The Court of Appeals reversed the District Court's denial of the habeas petition and remanded the case for the District Court to issue a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state began trial proceedings within 120 days of the issuance of the mandate. Pet. App. A30.

SUMMARY OF ARGUMENT

I. Section 2254(d) prohibits a federal court from granting habeas relief where a state court has adjudicated a state prisoner's federal claim on the merits, unless the state court decision is contrary to or an objectively unreasonable application of clearly established federal law as determined by the Supreme Court. The language of § 2254(d) does not include an extension of Supreme Court precedents to a new context as a ground for habeas relief.

As a threshold matter, this Court has already held that § 2254(d) limits "clearly established Federal law, as determined by the Supreme Court of the United States" to the holdings of this Court's decisions. When collateral relief depends on

xtending a rule of Supreme Court decisions to a novel context, he extension will necessarily involve ambiguous or unclear ontours of legal principles or new legal grounds. By definition, uch an extension will not have already been clearly established t the time of the state court adjudication.

The clause "as determined by the Supreme Court of the Jnited States," further restricts the source of clearly established aw. That restriction bars lower federal courts from extrapolating a rule from Supreme Court precedents that this Court itself has not held to be a rule of law. Thus, a state court s not required to anticipate changes in a well-settled core rule for its decision to be accorded § 2254(d)'s protection.

Section 2254(d) forbids continuing reexamination of final state judgments based upon later emerging legal doctrine. The "contrary to" and "unreasonable application" clauses provide no authorization for granting habeas relief when a state court does not extend Supreme Court precedent. By allowing only these two narrow exceptions to the general statutory prohibition against collateral relief, Congress contemplated that writs would not be issued under any other circumstances under § 2254(d)(1). The "contrary to" clause makes relief available only if the state court arrived at a conclusion opposite to that reached by this Court on a question of law or if the state court decided the case differently than the Supreme Court has on a set of materially indistinguishable facts. By definition, a state court decision that does not extend Supreme Court precedent cannot be "opposite" to a conclusion on a question of law that this Court has never decided. Similarly, refusing to extend a legal rule does not decide a case differently than the Supreme Court has on a set of materially indistinguishable facts.

The "unreasonable application" clause allows relief only if the state court identifies the correct governing legal principle from this Court's decisions, but unreasonably applies that principle to the facts of the case. An extension of a legal principle to a novel setting is not an application of clearly established Supreme Court precedent because "application" and

"extension" do not share the same meaning. Extension means development, expansion, and innovation, while application assumes the existence of a defined rule governing an established context. Furthermore, even if extension of a legal principle to a new context could be considered an application of clearly established Supreme Court law, a state court's adjudication that does not extend Supreme Court law will rarely be objectively unreasonable, for reasonable minds will differ whether a precedent of this Court dictates its extension.

To allow habeas corpus relief where the state court correctly identifies and invokes this Court's holdings and reasonably applies this Court's rules would run afoul of § 2254(d). The Ninth Circuit's decision in this case illustrates that granting relief because a state court decision did not extend Supreme Court precedent as innovated by a lower federal court, is irreconcilable with § 2254(d). The Ninth Circuit changed this Court's rule for a "custody" determination for *Miranda* purposes by engrafting onto it a rule from the fundamentally distinct context of voluntariness. The Ninth Circuit recognized that no Supreme Court case had previously set forth such a new rule, yet determined that the state court unreasonably applied clearly established Supreme Court law because it did not apply the Ninth Circuit's altered rule.

II. The California Court of Appeal's decision was not only objectively reasonable, but correct. *Miranda* warnings are required only when a person is "in custody." "Custody" is not a state of mind. Rather, as this Court has repeatedly explained, an individual is in "custody" when he or she is under formal arrest or restrained in freedom of movement to the degree associated with a formal arrest. Not all coercive environments mandate *Miranda* warnings. There is only one type of coercive environment to which *Miranda* applies, one in which the person is restrained in freedom of movement to the degree associated with a formal arrest. Police officers are not required to give warnings to persons who are not under that type of restraint.

This Court has never required police officers to anticipate the frailties or idiosyncracies of the person they question. Instead, when this Court has determined "custody," it has considered only whether objective external factors amounted to restraint on freedom of movement associated with formal arrest.

Age and experience are individual characteristics that bear no relation to the degree of restraint on freedom of movement. A juvenile's age and experience might be relevant to the question of the voluntariness of a confession. The voluntariness of a confession, however, is a distinct and separate inquiry from the custody determination. To include age and experience in a custody determination would conflate the two different inquiries.

Including a juvenile's age and experience for a custody determination also would unrealistically require law enforcement officers to divine the age and experience of a juvenile. Law enforcement officers would face the prospect that identical police conduct would not be deemed "custody" for some individuals, but would be for others, thus blurring the *Miranda* advisement guidelines for officers to follow. As a practical consequence, a *per se* rule like that fashioned by the Ninth Circuit would result and would require police officers to give *Miranda* advisements to all juveniles and persons that police officers suspect to be juvenile, regardless of whether the persons are in custody. An overly-broad *Miranda* rule for juveniles would potentially exclude free and voluntary confessions deserving of the highest credit.

ARGUMENT

I.

SECTION 2254(d)'S BAR AGAINST HABEAS CORPUS RELIEF FOR CLAIMS ADJUDICATED IN STATE COURT UNDER CLEARLY ESTABLISHED LAW ALLOWS NO EXCEPTIONS FOR INSTANCES IN WHICH THE STATE COURT REFRAINS FROM "EXTENDING" THIS COURT'S HOLDINGS TO A NOVEL CONTEXT

In enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress profoundly changed the role of the federal habeas corpus courts in order to ensure that state court convictions are given effect to the fullest extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693 (2002). Where the state court has adjudicated a state prisoner's federal claim on its merits, the AEDPA through 28 U.S.C. § 2254(d) protects the state judgment and precludes habeas corpus relief unless the state court ruling was egregiously indefensible in light of federal law "clearly established" in the holdings of this Court's precedents. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). Thus, where it applies, § 2254(d)(1) bars relief except where the state court decision is "contrary to," or directly flouts, such clearly established law, or where the state court applies clearly established law to the facts of the case in an objectively unreasonable way. In *Williams*, this Court left open the question of how "extension of legal principle cases" should be treated under § 2254(d). 529 U.S. at 408-09.

Relief based upon a lower court's "extension" of Supreme Court law to a novel setting does not fit into the statutory framework. An "extension" of Supreme Court law entails altering the scope of a rule of law or invoking it in a novel setting to resolve a legal ground different from that which the rule was adopted to govern. In this case, for example, the Ninth

Circuit extended a legal rule governing voluntariness of confessions to the distinct setting of a claim of custody. The lower court's extension changed the rule of law governing custody as articulated in this Court's precedents. A new extension of a rule, wrought by a lower court, cannot already have been "clearly established" law "as "determined by the Supreme Court" under § 2254.

Nor can a state court decision that refrains from anticipating what almost inevitably would be a debatable extension of this Court's precedents be deemed either "contrary to" or an objectively "unreasonable application of" such clearly established law. A ruling can hardly be deemed "contrary to" a proffered extension of a rule of law that this Court has never adopted. Nor can refraining from changing a rule of law be accurately categorized as unreasonably "applying" it, for extending a rule is qualitatively different from simply applying a settled rule to evaluate particular facts.

Here, the California Court of Appeal correctly identified this Court's clearly established objective test for determining custody for *Miranda* purposes, applied that rule to the individual facts, and reasonably determined that the circumstances did not establish that Alvarado was in custody. Yet the Ninth Circuit, despite recognizing that this Court had never required consideration of a juvenile suspect's individual characteristics or subjective viewpoint in determining custody, rejected the state court ruling as "unreasonable" under § 2254(d) because it did not change the rules and extend this Court's precedents so as to require consideration of such factors. To allow habeas corpus relief where the state court faithfully identifies and invokes this Court's precise holdings and reasonably applies those accepted rules to the facts of an individual case, however, violates the command of § 2254(d).

A. "Clearly Established Federal Law, As Determined By The Supreme Court Of The United States" Does Not Include An Extension Of A Supreme Court Holding To A Novel Setting

As the baseline, the federal habeas court under § 2254(d) must ascertain what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." *Lockyer v. Andrade*, 583 U.S. 63, __, 123 S. Ct. 1166, 1172 (2003). The "clearly established Federal law" provision sets out the narrow limits on a federal habeas corpus court's power to override a final state court conviction. Under the strengthened protection that § 2254(d) affords to the finality of state criminal convictions, a prisoner collaterally attacking a state adjudication of his federal claim must demonstrate that the state ruling is irreconcilable with a limited, core set of rules "clearly established" by the "holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *See Williams*, 529 U.S. at 412.

Where collateral relief depends on extending a Supreme Court rule of law so as to apply it to a novel context or to a different kind of claim, however, it necessarily will involve invoking unexplored contours of a rule rather than the core rule that itself has been "clearly established" by this Court. But, as this Court recently explained in *Lockyer v. Andrade*, 123 S. Ct. at 1173, 1175, a final state court conviction is not required to conform, in retrospect, with unclear contours of legal principles that might be clearly established in other respects. *Accord, Mitchell v. Esparza*, No. 02-1369, slip op. at 5-6 (U.S. Nov. 3, 2003). *Andrade* recognized that the pertinent rule in that case, insofar as it was "clearly established" from this Court's Eighth Amendment precedents, simply provided for review of prison sentences under a general "gross disproportionality" standard. *Andrade*, 123 S. Ct. at 1173. As *Andrade* explained, the Court's precedents had not clearly established what factors would demonstrate disproportionality in a particular prison term

of years. *Id.* at 1173, 1175. Thus, § 2254(d) resists the notion that habeas corpus relief is available where the state court correctly identifies this Court's "clearly established" law but refrains from extrapolating further from this Court's core rules. A new extension endorsed by a lower court cannot be "clearly established" Supreme Court law.

This Court's habeas corpus retroactivity jurisprudence, as developed in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality op.), and its progeny, recognizes the difference between "clearly established" law and extensions of precedent into novel settings. Under *Teague*, a habeas petitioner normally cannot benefit from a "new rule" of criminal procedure announced after his conviction became final on direct appeal. 489 U.S. at 305-10. A new rule under *Teague* is one that is "not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (emphasis in original). Stated another way, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government. *Butler v. McKellar*, 494 U.S. 407, 412 (1990). In barring relief based on "new rules," the *Teague* doctrine recognizes that the purpose of federal habeas corpus is to guarantee that state convictions comport with the federal constitutional law in existence at the time the conviction became final, and not to continually reexamine final judgments based upon later emerging legal doctrine. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

In defining "clearly established Federal law, as determined by the Supreme Court of the United States," this Court has said that, "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)." *Williams*, 529 U.S. at 412. The phrase "clearly established Federal law, as determined by the Supreme Court of the United States," similarly prohibits reexamination of final judgments based upon later emerging legal doctrine. *See* 141 Cong. Rec. S7845 (June 7, 1995) (statement of Sen. Hatch)

that this Court itself has never reached. Nor does a refusal to "extend" the governing legal rule decide a case differently than the Supreme Court has on a set of materially indistinguishable facts. If a materially indistinguishable set of facts is involved, then no alteration of the legal rule that this Court has adopted for such situations is necessary in order to allow habeas corpus relief. Instead, relief would be allowable because the clearly established law itself dictates it, without resort to extensions or changes in that law.

It is not surprising, then, that the Ninth Circuit in this case never purported to rest its grant of the writ on the "contrary to * * * clearly established Federal law" exception to § 2254(d)'s prohibition against relief. That exception does not allow the possibility of holding a state conviction hostage to the invocation of asserted rules of law never set out in this Court's precedents. It is significant that Congress chose to employ the "contrary to" criterion as the statutory provision that deals directly with disputes about the identity and scope of the abstract legal rules that govern the prisoner's claim. *See Williams*, 529 U.S. at 412-13. If Congress had intended to expose the final state-court judgment to attack based upon failures to "extend" clearly established law, it would not have chosen a criterion that, as this Court has explained, contemplates no variations on Supreme Court holdings other than those that directly contradict them. Instead, recognizing that extensions of precedent will inevitably be controversial, with reasonable arguments for and against the extensions to be predicted, Congress allowed only a strict "contrary to" exception in order to protect state convictions from federal nullification on such grounds.

C. Declining To Extend A Legal Principle To A New Context Cannot Be An "Unreasonable Application" Of Clearly Established Supreme Court Law

Finally, if the state court applied the correct Supreme Court rule, the federal court under § 2254(d)(1) determines whether it was applied in an objectively reasonable manner. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413.

1. "Extending" Is Not "Applying"

An extension of a legal principle to a new context is not an "application" of clearly established Supreme Court law. Neither the word nor the concept of "extension" appears in § 2254(d). Extension means "a stretching out or stretching forth," "lengthening, furthering, developing," or "expansion, enlargement, augmentation, increase." Webster's Third New Int'l Dictionary 804 (2002). In contrast, an "application" is commonly understood to mean, "the bringing to bear (as of one general statement upon another) by way of elucidation." *Id.* at 105. Extension and application do not commonly have the same meaning. The former contemplates innovation, liberalization, and expansion; the latter presupposes the existence of commonly understood rules within a recognized and established context.

In a sophisticated analysis, the Eleventh Circuit in *Hawkins v. Alabama*, 318 F.3d 1302, 1306 n.3 (CA11 2003), disagreed with the Ninth Circuit's treatment of "extending" precedent as an incident of "applying" clearly established law. The Eleventh Circuit explained the import of "extend" as the Ninth Circuit used it in the decision below:

> But "extend" in a different sense, can mean to "widen the range, scope, area of application of (a law, operation, dominion, state of things, etc.); to enlarge the scope of meaning of (a word)." 5 *The Oxford English Dictionary* 595 (2d ed. 1989). *See generally Alvarado*, 2002 WL 31829483 at *9, at --. In this sense, we see an impermissible conflict with Congress's expressed intent in AEDPA.

Hawkins, 318 F.3d at 1306 n.3. The *Hawkins* court explained as follows:

> We reject that Congress intended for AEDPA's protection for state court decisions to be conditioned on the state court's widening, or enlarging, the rules made by Supreme Court decisions. To widen the scope of or to enlarge Supreme Court rules is not to follow "clearly established" Supreme Court law, but is to innovate.

Id. The Eleventh Circuit held that, to acquire § 2254(d)'s protection, a state court is not required to predict that the Supreme Court might widen its rule if it were faced with new and substantially different circumstances. *Id.*

Put differently, whether a rule is being extended to a novel setting instead of simply being applied to the facts depends in large part on the nature of the rule. *Cf. Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring) (stating that whether a prisoner seeks the application of an old rule in a novel setting, and thus a new rule, depends in large part on the nature of the rule). If a rule is specific, or designed for the purpose of evaluating facts within a particular context, application of the rule to facts outside of that context would constitute an extension of that rule into a novel setting. A rule that specifically applies in one context, or that is designed to govern one type of claim, necessarily is changed or extended when it is

imported into a different context or used to resolve a different claim. Here, for example, the Ninth Circuit took a legal rule for determining voluntariness and imported it into a different context to resolve a custody claim. By extending the rule, the Ninth Circuit fundamentally changed the rule for resolving a custody claim.

There also are rules of general application designed for the purpose of evaluating a myriad of disparate factual contexts. *Cf. id.* at 309 (Kennedy, J., concurring). Straightforward applications of a rule of general application such as that of *Jackson v. Virginia*, 443 U.S. 307 (1979), for evaluating the sufficiency of evidence in support of a conviction, will not result in "extensions" of the *Jackson* rule merely on account of the variations in the facts and evidence of each new case. Nevertheless, a misapplication of a rule of general application might yield an improper extension of Supreme Court precedent to a novel setting. *See Williams*, 529 U.S. at 408 (stating, "in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts."). Careful scrutiny of purported "applications" of such general rules therefore is necessary to avoid hidden "extensions" of law. Here, however, the extension is not hidden. The Ninth Circuit changed the rule and therefore did not "apply" a clearly established rule.

2. Declining To Extend Is Not Unreasonable

Even if an extension of a legal principle could be considered an application of clearly established Supreme Court law, it is difficult to conceive that a state court ruling that does not extend well-settled Supreme Court doctrine to a novel setting would be objectively unreasonable and therefore the basis of relief under § 2254(d). In *Williams v. Taylor*, 529 U.S. at 411, this Court discussed the meaning of § 2254(d)(1)'s use of the word "unreasonable," as follows:

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Moreover, the application must be objectively unreasonable. *Id.* at 409. Accord, *Yarborough v. Gentry*, No. 02-1597, slip op. at 5, 10-11 (U.S. Oct. 20, 2003).

Because of the high threshold set by § 2254(d), only in the rarest of cases could it be argued that a state adjudication that refrains from extending clearly established federal law to a new context is objectively unreasonable under § 2254(d). There have been many instances in which jurists have reasonably disagreed as to whether Supreme Court law should be extended, and subsequently this Court has clarified that it did not intend such extensions. "Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler*, 494 U.S. at 415.

For example, in *Moran v. Burbine*, 475 U.S. 412, 419 (1986), the First Circuit held that the police's failure to inform the defendant that an attorney retained by the defendant's sister was trying to reach him vitiated the defendant's waiver of his *Miranda* rights. The defendant argued that *Miranda* should have been extended to condemn the conduct of the police. *Id.* at 424. This Court reversed the First Circuit's judgment and declined to extend *Miranda*'s reach. *Id.* at 427. In doing so, this Court recognized that a number of state courts had reached a contrary conclusion:

> [H]owever, our interpretative duties go well beyond deferring to the numerical preponderance of lower court decisions * * *. Nothing we say today disables

> the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions.

Id. at 427-28.

In *Fare v. Michael C.*, 442 U.S. 707, 722 (1979), the California Supreme Court determined that the close relationship between juveniles and their probation officers compelled the conclusion that a probation officer was sufficiently like a lawyer so that, for purposes of *Miranda*, the request by a juvenile to speak with his probation officer *per se* constituted an invocation of his Fifth Amendment right. This Court reversed, refusing to extend *Miranda*'s requirements. *Id.* at 722-23.

As demonstrated in *Fare* and *Moran* and as reflected in this Court's *Teague* cases, reasonable minds will differ whether a precedent of this Court compels an extension into a new context. A state court's adjudication that does not extend Supreme Court law to a novel setting will rarely be objectively unreasonable because extending well-settled legal rules will usually have reasonable countervailing arguments that may even be adopted by this Court. Stated another way, if the application of the Court's clearly established precedent to a given set of facts were truly so predictable as not to admit reasonable countervailing arguments, the application would not be an extension. Under § 2254(d), habeas relief cannot be granted on account of a state court's refusal to extend Supreme Court law to a new context.

Under § 2254(d), a federal habeas court shall not grant a petition for writ of habeas corpus except for two situations—the state court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law,

as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 412. By setting forth those two narrow exceptions in § 2254, Congress contemplated the type of state court decisions that would require writs to be issued. Had Congress intended to permit a federal habeas court to grant a writ for an unreasonable extension of clearly established Supreme Court law, it would have accordingly amended § 2254(d). *See Northbrook Nat'l. Ins. Co. v. Brewer*, 493 U.S. 6, 12-13 (1989).

D. Because The State Court's Adjudication Was Neither Contrary To Nor An Unreasonable Application Of Clearly Established Supreme Court Precedent, The Ninth Circuit Improperly Granted Habeas Relief Under § 2254(d) By Extending A Supreme Court Holding To A New Context

This case presents, precisely, the incongruity of condemning a state decision as contrary to law or as objectively unreasonable merely for not extending this Court's holdings to a new context under § 2254(d)(1). Here, the state court's decision was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent for a "custody" determination for *Miranda* purposes. The Ninth Circuit, however, improperly applied § 2254(d), by requiring the state court to extrapolate Supreme Court precedent from the voluntariness context to a "custody" determination in a way this Court has never done.

1. The State Court's Adjudication Was Neither Contrary To Nor An Unreasonable Application Of Clearly Established Supreme Court Precedent

Here, Alvarado claimed that he should have been advised of his *Miranda* rights because he was in custody during his interview. J.A. 46-69. The Supreme Court law as to a

"custody" determination pursuant to *Miranda* is clearly established. As further discussed below (*see* Argument II), *Miranda* requires warnings only when there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Miranda*, 384 U.S. at 444. *Miranda* warnings are limited to only that sort of coercive environment. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). As the Ninth Circuit acknowledged, the state court correctly identified this Court's objective test for determining custody for *Miranda* purposes. Pet. App. A7. The state court's decision was not contrary to clearly established Supreme Court precedent.

The state court then looked at the pertinent circumstances surrounding Alvarado's interview. Pet. App. C12-C17. The court cited facts including that: Alvarado was not told he could not leave until he told the truth; he was not subjected to intense and aggressive tactics; and although Detective Comstock made it clear to Alvarado that she disbelieved his early, exculpatory version of the events on the night of the murder, she did not fabricate evidence or subject him to intense pressure. Pet. App. C17. Although the Ninth Circuit criticized the state court for failing to consider that Alvarado's parents were refused permission to be present during the interview, there was no evidence presented to support the allegation. *See* J.A. 72-165, 331-39, 350-54, 437-39; Pet. App. A25-A26. The state court reasonably determined that Alvarado was not in custody and no *Miranda* warnings were required. Pet. App. C17. As in *Yarborough v. Gentry*, slip op. at 5, "[t]hat conclusion was supported by the record." That is all that was required by AEDPA.

The California Court of Appeal's decision in the instant case was also consistent with the decisions of at least three other circuits. *See United States v. Erving L.*, 147 F.3d 1240, 1248 (CA10 1998) (declining to create a dual track for "in custody" determinations by making such determinations objective when the suspect is an adult but subjective when the suspect is a child

because such an approach is directly contrary to the approach adopted by the Supreme Court); *United States v. J.H.H.*, 22 F.3d 821, 823, 831 (CA8 1994) (rejecting fourteen-year-old defendant's argument that his police interview was a custodial interrogation and his statement was coerced by threats without addressing or analyzing the "juvenile's status"); *United States v. Macklin*, 900 F.2d 948, 949-51 (CA6 1990) (holding that a reasonable person test, rather than a subjective test, is appropriate to determine whether a mildly retarded suspect was in custody). The California Court of Appeal's adjudication was not an unreasonable application of clearly established Supreme Court law. Accordingly, the state court's decision was entitled to AEDPA protection and precluded habeas corpus relief.

2. The Ninth Circuit's Decision Runs Afoul Of § 2254(d)

The Ninth Circuit, however, did not accord the state court's decision AEDPA protection. Instead, the Ninth Circuit took a rule that applied in the voluntariness context, engrafted it onto the "custody" context, and condemned the state court for not doing the same thing. This sort of an alteration of a Supreme Court rule is an extension of precedent that is irreconcilable with AEDPA.

This Court had never required consideration of a juvenile suspect's individual characteristics or subjective viewpoint in determining custody for *Miranda* purposes. This Court's standard for determining custody for *Miranda* purposes is the well-established objective test that requires warnings only when there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The Ninth Circuit recognized as much. Pet. App. A7 (stating that the California Court of Appeal identified the correct legal standard for making an "in custody" determination), A22 (acknowledging that the Supreme Court has not had a specific occasion to analyze how

a defendant's juvenile status may alter an "in custody" determination).

Despite this recognition, the Ninth Circuit adopted an overly-expansive view of clearly established Supreme Court law. And by doing so, the Ninth Circuit changed the rule for determining custody for *Miranda* purposes. The Ninth Circuit cited *Haley v. Ohio*, 332 U.S. 596 (1948), *Fare v. Michael C.*, 442 U.S. 707, *In re Gault*, 387 U.S. 1 (1967), and their progeny, in support of its assertion that "due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation." Pet. App. A6. These cases, however, all consider a defendant's juvenile status in determining the voluntariness of a confession or the voluntariness of a waiver of constitutional rights. *Fare*, 442 U.S. at 725; *In re Gault*, 387 U.S. at 45; *Haley*, 332 U.S. at 599-601. They do not speak to the issue raised in the instant case—a "custody" determination pursuant to *Miranda*. Rather, they apply to this Court's longstanding voluntariness jurisprudence, which was designed to answer a different question—not whether a suspect is in custody so as to trigger *Miranda* warnings, but whether a particular person's will was overborne. The latter inquiry inherently and necessarily considers the individual characteristics of the particular person. *See Fare*, 442 U.S. at 724-26. These voluntariness cases are not even analogous to "custody" determination cases and hardly put other courts on notice that *Miranda* compelled considering a defendant's juvenile status in determining whether the defendant was in custody.

The Ninth Circuit erroneously changed the custody test and broadened it at a level of generality that made the "clearly established" law limitation meaningless. *See Sawyer*, 497 U.S. at 236. In a way, the Ninth Circuit recast and reshaped Alvarado's claim that he should have been advised of his rights pursuant to *Miranda*, and transformed it into an involuntariness of confession claim. The improper effect is that the court

imposed a new obligation on the state courts. *Cf. Butler*, 494 U.S. at 412.

It is true that the Ninth Circuit noted that a number of state court decisions, mostly from intermediate courts, have ruled that juvenile status is relevant to the "in custody" determination. Pet. App. A19-A20 n.5. Of course, this Court's "interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions * * *." *Moran*, 475 U.S. at 427. Moreover, if state courts faithfully follow clearly established Supreme Court law in determining custody under *Miranda*, it would not be surprising that their decisions will not refer to or rely on a juvenile's age and experience. *See, e.g., J.H.H.*, 22 F.3d at 831. To conclude that a juvenile's status should be considered in determining "custody" for *Miranda* purposes might be a salutary policy innovation, but it was certainly not dictated by this Court's clearly established *Miranda* precedent. *See Lockyer v. Andrade*, 123 S. Ct. at 1173, 1175.

To the contrary, this Court's precedent suggests the opposite of the Ninth Circuit's holding. This Court has repeatedly held that there is a fundamental distinction between the voluntariness of a confession and a "custody" determination for *Miranda* purposes. *Dickerson v. United States*, 530 U.S. 428, 434-35, 444 (2000); *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984). Whether a juvenile's status should be considered in determining "custody" for *Miranda* purposes is not a foregone conclusion and is not dictated by legal principles in the separate inquiries of voluntariness of confessions and waivers of constitutional rights.

There was no clearly established law requiring the state court to consider Alvarado's juvenile status in determining whether he was "in custody" pursuant to *Miranda*. Under § 2254(d), a writ may not be granted when the state court abstained from creating a new rule for a "custody" determination for juveniles under *Miranda*.

II.

A JUVENILE'S AGE AND EXPERIENCE ARE IRRELEVANT FOR DETERMINING "CUSTODY" FOR *MIRANDA* PURPOSES

The state court's determination that Alvarado was not in "custody" for *Miranda* purposes was not simply reasonable and entitled to deference under § 2254(d). It also proves to be correct.

The question is whether age and experience are relevant additional factors bearing on "custody" during an interview so as to require *Miranda* warnings. The answer is that a juvenile's age and experience are irrelevant for determining "custody" for *Miranda* purposes because, as this Court has consistently recognized, "custody" depends upon whether external objective factors amounted to a formal arrest. The Ninth Circuit fundamentally misconceived the *Miranda* rule when it held that a court must consider a juvenile's age and experience in determining whether he or she was in custody for *Miranda* purposes.

A. *Miranda* Requires Warnings Only When The Individual Is Under Formal Arrest Or Restrained To The Degree Associated With A Formal Arrest

Prior to *Miranda*, this Court evaluated the admissibility of a criminal defendant's confession under a voluntariness test that recognized that coerced confessions are inherently untrustworthy. *Dickerson*, 530 U.S. at 432-33. *Miranda* created a rule that requires certain warnings only when there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Miranda*, 384 U.S. at 444. To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, *Miranda* held that suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say

may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed at the interrogation. *Id.*

The *Miranda* Court explained, "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. *Miranda* does not require police officers to give warnings to persons who are not under restraint. *Id.* at 477. "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Id.* at 478.

A coercive environment, alone, does not trigger *Miranda* warnings. "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Oregon v. Mathiason*, 429 U.S. at 495. "*Miranda* warnings are required only where there has been a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Id.* (emphasis in original).

In reversing a California Court of Appeal's decision that a defendant was in custody for *Miranda* purposes, this Court in *California v. Beheler*, 463 U.S. at 1124-25, criticized the state court's consideration of irrelevant factors such as the length of time that elapsed between the commission of the crime and the police interview and that the police knew more about Beheler before his interview than they did in *Mathiason*. The *Beheler* Court stated:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving

> *Miranda* protection, the *ultimate inquiry* is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

Id. (quoting *Mathiason*, 429 U.S. at 495) (emphasis added).

The Warden recognizes that this Court has sometimes described the "in custody" determination as a "reasonable person test." *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Stansbury v. California*, 511 U.S. 318, 325 (1994); *Berkemer*, 468 U.S. at 442. But even a cursory review of those cases discloses that this Court's references to a "reasonable person" were intended to explain why the interrogating police officer's subjective intention did not control the "custody" determination, and that any use of "reasonable person" language was not meant to alter the ultimate objective inquiry that focused on external indicia of arrest.

The "reasonable person" language, in connection with a "custody" determination, first appears in *Berkemer v. McCarty*. In *Berkemer*, the defendant argued that the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered a custodial interrogation. 468 U.S. at 435. This Court rejected the argument. *Id.* at 437. In holding that the defendant was not in custody before his arrest, this Court stated:

> Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular

> time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Id. at 442 (footnote omitted).

Thus, the *Berkemer* court used the phrase "reasonable man" to explain that the state trooper's unarticulated plan to charge the defendant with a traffic offense did not bear on whether the defendant was in custody. In finding that the defendant did not need to be given *Miranda* warnings prior to the time the state trooper placed him under arrest, however, the *Berkemer* court concluded that the defendant "has failed to demonstrate that, at any time between the initial stop and the arrest, he *was subjected to restraints comparable to those associated with a formal arrest*." *Id.* at 441 (emphasis added). The *Berkemer* Court stated, "It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Id.* at 440 (quoting *Beheler*, 463 U.S. at 1125).

Berkemer's reference to a reasonable person clearly did not contemplate consideration of individual characteristics such as a juvenile's age or experience. *Berkemer* specifically explained that the custody inquiry does not "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question." *Berkemer*, 468 U.S. at 442 n.35 (quoting *People v. P.*, 21 N.Y. 2d 1, 9-10, 233 N.E.2d 255, 260 (1967)). In specifying that the reasonable person test is an objective test, this Court recognized that a suspect's state of mind has no substantial relevance to the indicia of custody. *Berkemer*, 468 U.S. at 442 n.35.

Stansbury v. California, 511 U.S. at 325, also quoted *Berkemer's* language about a "reasonable" person. But, as in *Berkemer*, the Court in *Stansbury* merely recognized again that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment of whether the person is in custody, and did

not depart in any way from the rule that custody depends on objective indicia of arrest. The *Stansbury* Court emphasized that "it is the *objective surroundings*, and not any undisclosed views, that control the *Miranda* custody inquiry." *Id.* at 325 (emphasis added). Ultimately, the *Stansbury* Court declined to determine whether the defendant was in custody for purposes of *Miranda* and remanded the case for the California Supreme Court to consider the question. *Id.* at 326.

Third, in the course of holding that federal habeas courts independently review state-court "in custody" determinations, this Court in *Thompson v. Keohane* stated:

> Two discrete inquiries are essential to the ["in custody"] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*) (quoting *Mathiason*, 429 U.S., at 495).

Thompson, 516 U.S. at 112. This statement, again, hardly suggests that a different "reasonable person" has supplanted the traditional "custody" inquiry into whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The *Thompson* court declined to determine whether the defendant was in custody for *Miranda* purposes and remanded the case for independent review by a federal habeas court. *Id.* at 116.

Thompson, *Stansbury*, and *Berkemer*, then, each confirm that the ultimate inquiry remains whether there is a formal arrest

or restraint on freedom of movement of the degree associated with a formal arrest. *Thompson*, 516 U.S. at 112; *Stansbury*, 511 U.S. at 322; *Berkemer*, 468 U.S. at 441. Such an inquiry does not include a juvenile's age or experience.

The proof of this, moreover, may be found in this Court's actual adjudications of questions of "custody" for *Miranda* purposes. In inquiring into "custody," this Court in fact has considered only whether objective external factors amounted to restraint on freedom of movement associated with a formal arrest.

For example, in *Orozco v. Texas*, 394 U.S. 324, 326 (1969), the state argued that since the defendant was interrogated on his own bed, in familiar surroundings, *Miranda* did not apply. This Court held that the defendant should have been advised of his constitutional rights because according to an officer's testimony, the defendant was not free to go where he pleased, "but was under arrest" when he was questioned in his bedroom in the early hours of the morning. *Id.* at 325, 327.

In *Beckwith v. United States*, 425 U.S. 341, 345 (1976), the defendant argued that he should have been given *Miranda* warnings because the investigation had focused on him. He had been interviewed at his home and was neither arrested nor detained against his will. *Id.* at 342-44. He argued, however, that being the focus of the investigation placed him under psychological restraints that were equivalent of custody. *Id.* at 345. This Court did not consider this subjective "psychological" restraint to be an indicia of arrest, and stated that the defendant "hardly found himself in the custodial situation described by the Miranda Court as the basis for its holding." *Id.* at 347.

Similarly, in *Oregon v. Mathiason*, 429 U.S. at 495, this Court focused on objective indicia of arrest in determining that the defendant was not in custody. *Mathiason* explained:

> there is no indication that the questioning took place in a context where respondent's freedom to depart

> was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from the facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Id. In contrast to this concentration of objective factors, this Court did not include in this analysis the fact, personal to the defendant, that he was a parolee. *See id.*

In *Beheler*, this Court focused on objective indicia of arrest in determining that the defendant had not been in custody. Specifically, the defendant voluntarily agreed to accompany police to the station house, the police specifically told the defendant that he was not under arrest, and the defendant was permitted to return to his home after the interview. 463 U.S. at 1122-23. There is no indication that the *Beheler* Court considered in determining that Beheler was not in custody the facts that Beheler had been drinking earlier in the day, was emotionally distraught, and was a parolee who was required to cooperate with the police. *See id.* at 1124-25. This Court determined, "[i]t is beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action. Indeed, Beheler's freedom was not restricted in any way whatsoever." *Id.* at 1123.

Also, in *Berkemer*, 468 U.S. at 441-42, this Court again looked to objective indicia of arrest in determining that the defendant had not been subjected to custodial interrogation. After a traffic stop, the state trooper had concluded that the defendant would be charged with a traffic offense and that his freedom to leave the scene would be terminated. The defendant, however, was not told that he would be taken into custody. Instead, the trooper asked the defendant to perform a field sobriety test. While still at the scene of the traffic stop, the

trooper asked the defendant whether he had been using intoxicants. The defendant replied that he had consumed two beers and had smoked marijuana a short time before. Thereupon, the defendant was formally arrested. *Id.* at 423.

The *Berkemer* Court held that nothing in the record indicated that the defendant should have been given *Miranda* warnings at any point prior to being placed under arrest. The *Berkemer* Court reasoned that the defendant was not subjected to restraints comparable to those associated with a formal arrest and that at no time was the defendant informed that his detention would not be temporary. *Id.* at 441-42. This Court also explained that a "modest number of questions" and a request for the defendant to perform a field sobriety test at a location visible to passing motorists could not "fairly be characterized as the functional equivalent of formal arrest." *Id.* at 442.

Like *Berkemer*, the defendant in *Pennsylvania v. Bruder*, 488 U.S. 9, 9-10 (1988) (*per curiam*) made statements during roadside questioning after a traffic stop. The *Bruder* Court focused on objective external aspects, specifically: "a single police officer asking the defendant a modest number of questions and requesting him to perform a simple balancing test at a location visible to passing motorists." *Id.* at 11 (quoting *Berkemer*, 468 U.S. at 442). More importantly, this Court expressly disapproved "any general proposition that custody exists whenever motorists think that their freedom of action has been restricted, for such a rationale would eviscerate *Berkemer* altogether." *Id.* at 11 n.2. The individual's state of mind has no place in determining custody. This Court's actual analyses demonstrate that only objective external factors amounting to restraint on freedom of movement associated with a formal arrest are relevant to whether persons are "in custody" for *Miranda* purposes.

B. Age And Personal Experience Are Individual Characteristics That Do Not Reflect The Degree Of Restraint On Freedom Of Movement

Beyond the fact that this Court, by word and deed, has made it clear that "custody" depends upon objective circumstances tantamount to an arrest, *Miranda* itself suggested that a person's background is irrelevant for the custody determination. "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact." *Miranda*, 384 U.S. at 468-69 (emphasis added).

Without any basis, the Ninth Circuit's inclusion of these factors presumes that juveniles will misperceive situations differently than a reasonable person. In essence, the Ninth Circuit's decision below requires law enforcement to calibrate their actions to account for how they might be perceived by an "unreasonable" person with a juvenile's age and experience. For the premise of the Ninth Circuit's embellishment on the law is that juveniles by their nature will misperceive as "custody" a setting that does not present objective indicia of restraint tantamount to an arrest.

Moreover, the Ninth Circuit's extension of this Court's precedents from a disparate context would, as a practical matter, operate as a *per se* rule requiring police officers to give *Miranda* advisements to all juveniles and persons that police officers suspect to be juveniles, regardless of whether they are actually in custody. A rule that *Miranda* applies to all juveniles or persons who appear to be juveniles has significant drawbacks and makes it unacceptable. It would substantially impede law enforcement by compelling the police either to take the time to warn all juveniles of their constitutional rights or forgo using self-incriminating statements made by those persons. *Cf. Berkemer*, 468 U.S. at 441 (refusing to create a rule that *Miranda* applies to all traffic stops). Moreover, such an overly-

expansive rule fails to account for the value of confessions. "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt * * *." *King v. Warickshall*, 1 Leach 262, 263-64, 168 Eng. Rep. 234, 235 (K.B. 1783). "Admissions of guilt are more than merely 'desirable,' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (quoting *United States v. Washington*, 431 U.S. 181, 186 (1977)).

This case demonstrates the arbitrariness of the Ninth Circuit's presumption. During his cross-examination at trial, Alvarado agreed with the prosecutor that his conversation with Detective Comstock was "low-key" and "friendly." J.A. 437-38. He did not feel threatened or coerced. J.A. 438-39. Also, Alvarado was over seventeen and a half years old at the time of the interview. J.A. 344. Under the Ninth Circuit's holding, his age and experience would have been irrelevant had he been interviewed less than six months later.

A juvenile's age and experience might be relevant to whether a confession is voluntary. "The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry." *Dickerson*, 530 U.S. at 435. Regardless of whether a juvenile defendant receives *Miranda* warnings, he or she might assert that the statements were involuntary. *See id.* at 444. Determining the voluntariness of a confession is a distinct inquiry from the "custody" determination for *Miranda* purposes. Including a juvenile's age and experience for a "custody" determination would conflate the two separate inquiries. To require courts to consider the age and experience of a person if he or she is a juvenile would be "an extension of the *Miranda* requirements [that] would cut this Court's holding in that case completely loose from its own explicitly stated rationale." *Cf. Beckwith*, 425 U.S. at 345.

C. Including A Juvenile's Age And Experience For "Custody" Determinations Would Blur *Miranda* Advisement Guidelines For Law Enforcement Officers To Follow

This Court in *Miranda* stated, "Our decision is not intended to hamper the traditional function of police officers in investigating crime." *Miranda*, 384 U.S. at 477; *see Moran v. Burbine*, 475 U.S. at 426-27 (stating that *Miranda* struck a balance between two interests—the need for effective enforcement of criminal laws and preventing constitutionally impermissible compulsion). Accordingly, this Court took care to announce "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 442. It has been a continuing goal of this Court's *Miranda* jurisprudence to provide effective guidance to law enforcement. *See Thompson v. Keohane*, 516 U.S. at 115. As this Court has "stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran*, 475 U.S. at 425 (quoting *Berkemer*, 468 U.S. at 430, and citing *New York v. Quarles*, 467 U.S. 649, 662-64 (1984) and *Fare v. Michael C.*, 442 U.S. at 718). Including a juvenile's age and experience for a "custody" determination, and therefore further suggesting that subjective perceptions of the suspect always should play a role, "would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters." *Cf. Moran*, 475 U.S. at 425.

In *Dickerson*, 530 U.S. at 444, this Court noted that a totality of the circumstances test would be more difficult than the "in custody" determination under *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner. As the *Miranda* Court recognized, assessments of factors such as age and experience "can never be more than speculation." 384 U.S. at 468-49. Law enforcement officers would face the prospect that identical police conduct

would not be deemed "custody" for some individuals, but would be for others.

The practical consequence of including age and experience in a "custody" determination for *Miranda* purposes is that law enforcement officers will not be able to determine whether *Miranda* rights should be given to a juvenile unless they can divine the age and experiences of the juvenile. It would be particularly impractical for law enforcement officers to obtain such information while on the scene of a crime. Including a juvenile's age and experience for custody determinations would not serve the interests that the *Miranda* rule was designed to protect and would impose burdens associated with *Miranda* on the police.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: November 13, 2003

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In The Supreme Court of the United States

MICHAEL YARBOROUGH, Warden of California State Prison – Los Angeles County,

Petitioner,

v.

MICHAEL ALVARADO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

On the night of September 22, 1995, seventeen-year-old Michael Alvarado went to Manuel Rivera's house to "hang out" with friends and spend the night, something he had done many times before. J.A. 377, 411-414. Later that night, the boys went to a nearby mall to use the pay phones, something they also had done many times before. J.A. 391, 414-416. At the mall, Paul Soto, a person Michael Alvarado had never met before that day, shot and killed Mr. Francisco Castaneda. J.A. 309, 350; Pet. App. C3-C4.

A month later, on October 24, 1995, Los Angeles County Sheriff's Detective Cheryl Comstock left a message at Michael Alvarado's home, where he lived with his parents, explaining that she "needed" to speak with him. J.A 34, 48-49, 72, 185; Pet. App. B3. Michael was 17 years old, in high school, and was working at the Town Center Hall for school credit. J.A. 34, 48, 122-123, 356; Pet. App. B3. Comstock also telephoned Michael's mother at the Post Office where she worked, and informed her that the police "needed" to speak to her son. J.A. 49, 72, 185. Mrs. Alvarado told Comstock that Michael's father would bring him to the Sheriff's station so he could be interviewed. J.A 72, 185, 350-351; Pet. App. B3. Both Michael's mother and father accompanied their son to the Sheriff's station, and they gave *their* permission for Comstock to interview him. J.A. 72-73, 185; Pet. App. B3. Before Michael was led away by Comstock he asked "Can't someone come in with me?" or "Should someone be here for me?" J.A. 49, 185-186. The question was met with silence. J.A. 185-186. As Michael was being escorted inside, his parents asked if they could accompany him, but Detective Comstock refused to permit Michael's parents to attend the interrogation. J.A. 49, 185-186. Mr. and Mrs. Alvarado waited in the lobby for two

and a half hours while Michael was questioned in an "interview room." J.A. 72-73, 186, 353-354.

Michael was brought through a lobby door, down a hallway and into a back room containing a table and two chairs. J.A. 351. Michael had never been in a police interrogation room before. J.A. 352. Michael heard another detective ask Comstock "What do we have here; we are going to question a suspect?" J.A. 50, 189. Michael was never told prior to the interrogation that he was not under arrest or that he was free to leave at any time. J.A. 72-165.

Detective Comstock employed many of the interrogation techniques with which this Court was concerned in *Miranda*. Michael was told to try to ignore that he was being tape recorded. J.A. 73. Detective Comstock questioned Michael alone[1] for two and one-half hours, one-half hour of which was not recorded. J.A. 72-165, 353, 557. Comstock expressed disbelief at Michael's version of events, told him that she was 95% sure of the facts since she had three notebooks full of witness accounts, and urged him to tell the truth: "Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of the sudden

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[1] "Officers are told by manuals that the 'principal psychological factor contributing to a successful interrogation is privacy – being alone with the person under interrogation.'" *Miranda v. Arizona*, 384 U.S. 436, 449 (1966) (quoting Inbau & Reid, *Criminal Interrogation and Confessions* 1 (1962)). The Miranda Court stated it was concerned "primarily with this interrogation atmosphere and the evils it can bring." *Id.* at 456.

you tell something far fetched different."[2] J.A. 50-54, 101-102, 106, 109; Pet. App. B3. Comstock then assured Michael that she knew he didn't have any intention of anything happening, and that maybe he wasn't thinking clearly because he had been drinking and maybe he was hiding behind the truck because he didn't want to be up there. Comstock told him "It's very difficult to admit when you've made a mistake like this, okay? And none of us like to have to admit when you made such a bad mistake."[3] J.A. 103, 109.

Michael then made self-incriminating statements about what took place before and after the shooting. J.A. 54. After Michael made these incriminating statements, Comstock asked Michael "When we're done here today, were you, you going to go back home or to your grandmother's?" J.A. 54. Later, Comstock offered Michael the use of a phone and told him "we should be done here pretty quick. I'll get you out of here, so you can go about

[2] "[T]he manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance maintain only an interest in confirming certain details. The guilt of the subject should be posited as a fact" *Miranda*, 384 U.S. at 450.

[3] "The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject had . . . too much to drink. . . . The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already – that he is guilty. Explanations to the contrary are dismissed and discouraged." *Miranda* 384 U.S. at 450. (citing Inbau & Reid, *supra*, at 34-55, 87). "The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt." *Id.* at 451.

your activities." J.A. 150. Shortly thereafter, Comstock told Michael "Okay we don't have anything else and what I'm going to do is go ahead, uhm, escort you out to the lobby where your parents are and then you guys can go about whatever activities you have and, uh, we'll conclude the interview." J.A. 165. Michael never left the interrogation until Comstock was finished with her questioning. J.A. 353-354. Subsequently, Comstock notified Michael's parents that she had an arrest warrant for him, and he surrendered to the police the next morning. J.A. 54-55, 354-355; Pet. App. C15.

At trial, the prosecution played excerpts of Michael's taped interview during its case in chief. The most damaging statement was Michael's saying that he knew Soto was going to rob the man and take his truck so they could get home from Rivera's place. J.A. 331-339 (RT 609); Pet. App. C4. However, evidence was also presented tending to show that respondent only learned of Soto's plan to rob the man and take his truck *after* the incident and before the interrogation.[4] J.A. 457, 459, 462, 482.

The defense focused on inconsistencies in Rivera's testimony, and respondent testified in his own defense. J.A. 201, 280-328, 341-570; Pet. App. C4. Michael denied an intent to kill Mr. Casteneda, and said he had not talked with the victim, nor made any demands. Pet. App. C4. He also testified that he did not have a gun or bullets that

[4] The prosecution also played a taped interview of Soto to the jury. In that interview, Soto said he was drunk on the night of the shooting, and that the gun had fired accidentally. Pet. App. C4.

night. *Id.* He insisted he had no idea what was going on and he did not encourage Soto in any way. *Id.*

The only evidence of Michael's culpability, other than his statements to police was the equivocal testimony of Manuel Rivera, another juvenile, who had been drinking and smoking marijuana prior to the incident, and who had been granted immunity in exchange for his testimony. J.A. 282, 319-322; Pet. App. 27-28. Rivera testified on direct examination that he heard Soto say "Let's jack" and "I'll give you half." J.A. 228-233, 237-238. Rivera believed Michael said "Let's go" because he saw his lips move. J.A. 233-234. Rivera saw Michael and Soto walk toward the truck according to Rivera. Michael approached the passenger side near the right rear tire and Soto approached the driver's side where Casteneda was going through a dumpster. The shooting followed immediately thereafter. J.A. 238-240, 243-245, 247, 252.

On cross-examination, Rivera admitted that he was talking on the phone in an alcove with people talking around him when Soto said "Let's jack." Rivera acknowledged that when this statement was made Michael was either in or walking back from the donut shop talking. J.A. 295-299, 304. Rivera also admitted that, during his earlier statements to police, he never said Soto uttered the phrase "Let's jack" again in front of Michael. J.A. 293; Pet. App. A28. Rivera could not say with certainty whether Michael ever said "Let's go" or "Let's do it" because Rivera did not get off the phone until after he heard the gunshot. J.A. 290-292, 296, 299, 303-304, 317, 327; Pet. App. A28. At the time of the shooting, Michael was several feet behind the rear passenger tire, he never talked to Casteneda, and he did not touch him or his truck. J.A. 315-316, 326. Rivera also admitted that he lied to the police and the prosecutor

about his role in hiding the gun. Although the crime occurred in 1995, it wasn't until 1997 that Rivera first claimed that Soto said "I'll give you half" or "Let's split it." J.A. 282-285, 293; Pet. App. A28.

Rivera testified that he and Michael frequently went to the mall to use the telephones there because the mall was behind Rivera's house and he didn't have a phone, and that they frequently went to lunch at the café there because it was by the high school. J.A. 346, 355-358, 362, 366-369, 391-392. The boys knew that there was a Sheriff's substation at the mall. J.A. 359, 371. Rivera said neither he nor Michael knew Soto had a gun before the shooting, nor was there any conversation that evening about shooting or robbing anyone. J.A. 305, 350, 404-405; Pet. App. A29. Michael never encouraged Soto, or knew what he was about to do. J.A. 436, 568-569. Immediately after Soto shot the victim, the group ran back to Rivera's house where Soto tried to hide his gun under Rivera's bed when Rivera was out of the room. J.A. 264, 269-270; Pet. App. A28.

Soto was convicted of first degree murder with the use of a gun, committed during the attempt to commit second degree robbery. He was sentenced to a term of life in prison without possibility of parole, plus four years for the firearm use. Pet. App. C4. Michael was convicted of first degree murder and attempted robbery, but on trial counsel's motion, the court reduced the conviction to second degree murder and sentenced him to a term of 15 years to life. Pet. App. C5.

Respondent adopts Petitioner's recitation of the procedural aspects of the case post-trial. Pet. Br. 4-6.

SUMMARY OF ARGUMENT

I. The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. When a person is taken into custody or deprived of his freedom by the authorities in any significant way, and then subjected to questioning, the privilege against self-incrimination is jeopardized and the Constitution requires that procedural safeguards be employed to protect that privilege. These procedural safeguards are encompassed in the now familiar *Miranda* warnings. "Custody," for *Miranda* purposes, is defined as formal arrest or a significant restraint on movement associated with formal arrest. This restraint can be psychological as well as physical. The test for determining custody is objective – whether, under the totality of the circumstances, a reasonable person in the suspect's position would have felt he or she was not at liberty to terminate the interrogation and leave. Factors to be taken into account in the totality of the circumstances are those objective facts apparent or known to both the police and the suspect at the time of the interrogation.

If the circumstances surrounding an interrogation include youth and other considerations attendant to a juvenile defendant, such as parental involvement at the behest of police and a subsequent show of authority by police in refusing to allow the parents to attend the interview, those factors, as this Court has recognized in other relevant contexts, cannot be ignored in either a consideration of the totality of the circumstances, or in calibrating the appropriate reasonable person standard. After examining all the circumstances surrounding an interrogation, if one of those objective circumstances is juvenile status, it cannot fairly be ignored. The relevant inquiry is not

whether a reasonable adult in the suspect's position would have felt free to terminate an interrogation and leave, but how a reasonable youth or juvenile of similar age and circumstance would have assessed his or her situation.

In sum, although it may not be appropriate to take into account a juvenile's individual personal characteristics, such as his level of maturity, or his cognitive abilities, because those are unique to him and would constitute a subjective analysis, in applying the objective test, it is appropriate to ask what a reasonable juvenile in the suspect's circumstances would understand his custody situation to be. The objective test cannot be applied in a rational manner if it completely ignores the fact that the suspect being interrogated is a juvenile. The standard, thus, remains an objective one; the relevant inquiry is whether a reasonable child or juvenile in the suspect's position would understand, based on the totality of the circumstances, that he was free to leave. This standard, which has been adopted in one form or another by every court to address the issue, will not unduly hamper legitimate law enforcement interests.

II. AEDPA is no barrier to habeas corpus relief if the relevant state court decision was either contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. The California Court of Appeal's decision, which determined that Michael Alvarado was not in custody, was both contrary to and an unreasonable application of clearly established federal law because the state court ignored salient factors, identified in this Court's custody relevant to the totality of the circumstances, and then misapplied the controlling legal standard to the facts of this case. The state court decision was also contrary to and an unreasonable application of

clearly established federal law in failing to recognize that the correct reasonable person standard in this case was that of a reasonable juvenile of similar age.

Because the state court's decision was objectively unreasonable, this Court need not decide whether the Ninth Circuit's decision was also correct under the "extension" analysis which panel used in deciding this case. This analysis, which the Ninth Circuit drew directly from this Court's decision in *Williams v. Taylor*, has been adopted by all the federal circuit courts of appeal. However, there is little functional difference between applying the law to an analogous context and "extending" it, and the Ninth Circuit correctly found that the California Court of Appeal decision in this case was unreasonable.

ARGUMENT

I. IN ASSESSING THE TOTALITY OF CIRCUMSTANCES AND IN APPLYING THE REASONABLE PERSON STANDARD, THE CALIFORNIA COURT OF APPEAL FAILED TO CONSIDER THAT RESPONDENT WAS A JUVENILE BROUGHT BY HIS PARENTS TO THE POLICE STATION ON POLICE DEMAND AND SEPARATED FROM THEM AGAINST HIS WILL.

A. *Miranda v. Arizona* Provides Constitutionally Required Safeguards to Preserve the Fifth Amendment Privilege Against Self-Incrimination in the Context of Custodial Police Interrogations.

The Fifth Amendment provides that no person may be "compelled in any criminal case to be a witness against

himself." U.S. Const. amend. V. "The Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (citing *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964)). "When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subject to questioning, the privilege against self-incrimination is jeopardized and procedural safeguards must be employed to protect the privilege." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

In *Miranda*, this Court announced "concrete constitutional guidelines for law enforcement agencies and courts to follow" in the context of custodial police interrogations. *Id.* at 442. Those guidelines, which are required by the Fifth Amendment, require police to provide suspects with four warnings: "a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Dickerson*, 530 U.S. at 434 (citing *Miranda*, 384 U.S. at 479).

"The warning[s] mandated by *Miranda* [were] meant to preserve the privilege during 'incommunicado interrogation of individuals in a police-dominated atmosphere,' which generates inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Illinois v. Perkins*, 496 U.S. 292, 296 (1990)

(quoting *Miranda*, 384 U.S. at 445, 467).[5] The *Miranda* safeguards "ensure that the police do not coerce or trick captive suspects into confessing [and] to relieve the 'inherently compelling pressures' generated by the custodial setting itself, 'which work to undermine the individual's will to resist.'" *Berkemer v. McCarty*, 468 U.S. 420, 433 (1983) (footnotes omitted).

B. Respondent Was "In Custody" for Purposes of *Miranda* Because Under the Totality of the Circumstances a Reasonable Person in His Position Would Not Have Felt Free to Terminate the Interrogation and Leave.

A person is in "custody" not only after a formal arrest, but whenever there has been a restraint on freedom of movement of the degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Miranda*, 384 U.S. at 444. This Court has established a two-part standard for determining whether a suspect is in custody for *Miranda* purpose: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry:' '[was] there a formal arrest or restraint on freedom of movement of the

[5] In *Miranda*, this Court also stressed that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448.

degree associated with a formal arrest.'" *Id.* at 112 (citing *Beheler*, 463 U.S. at 1125 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam))); *see also Stansbury v. California*, 511 U.S. 318, 322 (1994) ("In determining whether an individual was in custody, a court must examine all the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on movement" of the degree associated with a formal arrest')."

Although questioning at a police station does not conclusively resolve whether the restraint on a person's freedom of movement was such as to render the interrogation custodial, a police-conducted interrogation which occurs in an "interview room" at the police station is much more likely to be deemed custodial than other police-citizen encounters. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). This is evident from this Court's decision holding that many traffic stops are noncustodial for Fifth Amendment purposes because they are presumptively temporary and brief, and thus are different from "station house interrogation." *Berkemer*, 468 U.S. at 437-38. This Court also noted that traffic stops are public, and do not take place in the privacy of the police interrogation room. *Id.* Therefore, roadside stops are "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself [citations omitted] and in the subsequent cases in which [the Court has] applied *Miranda*." *Id.* at 439. Thus, as a general rule, most interrogations which involve a police officer questioning a crime suspect at the police station in a police interview room are custodial interrogations that trigger the need for the *Miranda* warnings.

Neither the suspect's nor the police officer's subjective assessment of the situation is relevant to the inquiry.[6] *Stansbury*, 511 U.S. at 323 (the determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned); *Beckwith v. United States*, 425 U.S. 341 (1976) (the "in custody" requirement is not satisfied merely because police interviewed a person who was the "focus" of a criminal investigation); *see also Berkemer*, 468 U.S. at 420. Rather, this Court has set forth an objective test, which focused on the facts known both to the suspect and the officer at the time of the challenged questioning, to determine whether a suspect was "in custody." *Berkemer*, 468 U.S. at 442.[7]

[6] Despite the clear directive of this Court in *Stansbury* and its progeny that the subjective intent of the suspect has no bearing on the "in custody" determination of *Miranda*, ironically (and inconsistent with their own arguments on the objective test for custody), both Petitioner and the Solicitor General have relied on Respondent's testimony during cross-examination where he acquiesced to the prosecutor's suggestion that his conversation with Comstock was "low-key" and "friendly" as evidence that Michael was not in custody. Pet. Br. 38, SG. Br. 27, J.A. 437-439. Many clearly custodial interrogations, e.g., the questioning of suspects who have been arrested and are in handcuffs, are "low-key" and "friendly." That does not mean, however, that the suspect is not in custody. Furthermore, it is clear in this case that Comstock's "low-key" approach was part of an intentional design to elicit incriminating information. This would be exactly the approach the interrogation manuals would call for when dealing with a juvenile. Comstock's mild-mannered reassuring approach, combined with her comments which clearly implied that Michael was not criminally responsible since he did not know what was going to happen, would be highly effective in securing an incriminating statement.

[7] Petitioner argues that this Court has considered only whether objective "external" factors amount to restraint on freedom of movement associated with a formal arrest, and that the ultimate objective

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This objective test has been labeled a "reasonable person" test which requires the court first to define the circumstances surrounding the interrogation, and then to ask whether a reasonable person in the defendant's shoes would have felt he or she was not at liberty to "terminate the investigation and leave."[8] *Thompson*, 516 U.S. at 112. "The relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442; *Stansbury*, 511 U.S. at 324. For the reasons discussed below, respondent's juvenile status, the fact that he was essentially transferred from his parents' custody into police custody, and other factors, were relevant to both parts of the *Thompson* equation: the totality of the circumstances surrounding the interrogation and the perceptions of a reasonable person being questioned under those circumstances.

inquiry focuses on "external" indicia of arrest. Pet. Br. 29, 31, 34, 36. If what petitioner means by "external" are those facts known or apparent to the suspect and the officer, then respondent agrees. However, if petitioner uses "external" to mean only the "physical" indicia of arrest, then this limited inquiry is contrary to this Court's concerns as expressed in *Miranda*: "Again, we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented." *Miranda*, 384 U.S. at 448.

[8] Petitioner seemingly disputes that this is the correct standard. "[T]his Court has *sometimes* described the 'in custody' determination as a 'reasonable person test' ... But ... the Court's references to a "reasonable person" were intended to explain why the interrogating police officer's subjective intention did not control the "custody" determination, and that any use of the "reasonable person" language was not meant to alter the ultimate objective inquiry that focused on external indicia of arrest." Pet. Br. 31. Petitioner plainly misunderstands the clearly established law; the reasonable person test is fundamental to the ultimate objective inquiry. *Thompson*, 516 U.S. at 112.

1. A Court Cannot Constitutionally Ignore Objective Circumstances Known to the Police Which Go Directly to the "In-Custody" Determination.

This Court's jurisprudence requires police officers to determine whether to give the *Miranda* warnings by assessing the known facts and circumstances of the individual being investigated and then placing themselves in that person's shoes assuming, of course, that the perceptions of the person before them are "reasonable." This necessarily requires the officer to consider objective factors known to her in assessing whether that person is "in custody" for *Miranda* purposes.

Objective relevant facts which this Court has held are relevant to the custody inquiry include: the location of the questioning, whether the interrogation was police-dominated, whether the surroundings were familiar, whether the defendant came to the place of questioning voluntarily, whether the person was informed that he was not under arrest, the length of the interview, whether police disclosed that the person being interrogated was a suspect, the use of physical contact or physical restraint, and whether the person was ultimately allowed to leave.[9]

[9] *Orozco v. Texas*, 394 U.S. 324, 325-27 (1969) (Defendant interrogated in own bed, in familiar surroundings, but he was still in custody because the officer testified that he was under arrest at the time of the questioning); *Beckwith*, 425 U.S. at 347 (Defendant questioned at his home in familiar surroundings) *Oregon v. Mathiason*, 429 U.S. at 493-94 (Defendant, not in custody, voluntarily came to police station, was immediately informed he was not under arrest, was interviewed for only one-half hour, was allowed to leave the police station without hindrance); *Beheler*, 463 U.S. 1121 (Defendant, not in custody,

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Facts which this Court has determined are *irrelevant* to the custody determination include: the length of time between the commission of crime and police questioning (*Beheler*, 436 U.S. at 1125); *un*disclosed police knowledge about the defendant or an unarticulated plan to arrest the suspect and an officer's false statements about finding fingerprints at scene. *Mathiason*, 429 U.S. at 495-96.

This Court has routinely stressed the relevance of objective facts known by both the police and the suspect at the time of the interrogation. For example, in the interrogation context, which is also an objective standard, this Court has made clear that where an officer has knowledge concerning a particular individual, that knowledge should be considered in the totality of the circumstances. *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980) ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect"). Just this term, in *United States v. Banks*, __ U.S. __, 124 S. Ct. 521 (2003), this Court held, in the Fourth Amendment context, that facts known to the police are relevant in determining what a reasonable officer would think under the circumstances.

voluntarily accompanied police to station, was specifically told he was not under arrest, was permitted to return home after the interview); *Berkemer*, 468 U.S. at 421-22, 441-42 (questioning suspect whose was not in custody, conducted in public, atmosphere substantially less police-dominated than station house, at traffic stop usually brief, no restraints comparable to formal arrest, and no reason to believe a traffic stop would not be temporary).

The reason for this rule is self-evident, the failure to consider facts known to law enforcement allows the police to exploit vulnerable suspects.

Examination of the objective relevant facts which have been considered by this Court in the past, and which were actually known to Detective Comstock in this case, demonstrates that Michael was "in custody" for *Miranda* purposes at the time of his interrogation. Respondent did not voluntarily come to the police station; instead, he was brought there by his parents upon police demand. He was then escorted into a police interrogation room in the station house. Michael's parents were precluded from attending the interrogation. He was a seventeen-year-old alone with an armed police officer, so the surroundings were police-dominated.[10] The surroundings were unfamiliar to Michael, who had never been arrested or been in an interrogation room before.[11] The police unequivocally communicated to respondent that he was a "suspect."[12] Michael was not informed that he was not under arrest or that he was free to leave.[13] The tape-recorded interview

[10] Curiously, the Solicitor General argues that despite being alone in an interrogation room in a police station with an armed homicide detective, the atmosphere of respondent's interview was not "police dominated." S.G. Br. 27. Considering all the facts of this case, that position is untenable.

[11] "Many of the psychological ploys discussed in *Miranda*, capitalize on the suspect's unfamiliarity with the officers and the environment." *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

[12] A police officer's subjective view that an individual is a suspect, if disclosed, is relevant to how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her "freedom of action." *Stansbury*, 511 U.S. at 324-26.

[13] *Beheler*, 463 U.S. at 1122; *Mathiason*, 429 U.S. at 495.

took over two hours, and the questioning was accusatory in tone with repeated pressure by Comstock for Michael to tell the "truth" as she viewed the "truth" based on her purported investigation to date.[14] J.A. 101-102. While petitioner makes much of the fact that Michael was allowed to leave following the interrogation, he did not know that "going in." Michael was only told he would be permitted to leave *after* he provided incriminating statements to Officer Comstock.

Furthermore, Comstock knew at the time she summoned Michael to the police station via his parents that he was a seventeen-year-old high school student living with his parents. Presumably, she also knew that he had no experience with law enforcement (since he had no prior record), and thus had never been in an interrogation room at the station house. Comstock also knew that Michael wanted his parents to attend the interrogation, and she obviously knew that Michael's parents wanted to be with him in the interrogation room. She also knew that she had blocked their attendance.

In determining that respondent was not "in custody," the state court found that since respondent was not told he could not leave until he told the truth, and that he was not subjected to intense and aggressive tactics, a reasonable person would have felt free to leave. Pet. App. C17. However, a number of the most salient facts noted above were totally ignored, by the state court in determining whether Michael was "in custody."

[14] *Beheler*, 463 U.S. at 1122; *Mathiason*, 429 U.S. at 495.

In fact, the state court completely ignored that Comstock directly involved Michael's parents in the transfer of custody of Michael from his parents to the police at the station house. This Court has acknowledged in the context of the Fourth Amendment that juveniles, unlike adults, are always in some form of custody. Juveniles are never at complete liberty to go about their business and, when not in the custody of their parents, are always in someone else's temporary custody. *Schall v. Martin*, 467 U.S. 253, 265 (1984); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Although custody for Fifth Amendment purposes is somewhat different than custody for Fourth Amendment purposes, juvenile status is certainly relevant to whether a person in the juvenile's position would feel at liberty to leave. This is particularly true where, as in this case, the juvenile submits to a claim of lawful authority after watching his parents submit to that same authority. *See, e.g., J.J.C.*, 689 N.E.2d 1172, 1180 (Ill. App. Ct. 1998) ("When a juvenile's parents are present [at the station house], request to confer with their child, and are effectively refused by law enforcement authorities, the presumption arises that the juvenile's will is overborne.") Here, Michael observed Comstock summarily reject his parents' request to go with him into the interrogation room. He also knew his parents submitted to Comstock's authority both by bringing him to the station at her request and by not failing to challenge her refusal to allow them to be present during the interrogation. Furthermore, Comstock never told Michael that he was not under arrest or that he was free to go prior to escorting him into the interrogation room, but instead told him that when they were done she would escort him back to his parents. Thus, it was known to both Michael and to Comstock that

Michael had been transferred from his parents' custody into hers.[15]

2. The Objective "Reasonable Person" in Respondent's Case Was a Reasonable Seventeen-Year-Old in His Position At the Time of the Interrogation.

Petitioner argues that a "reasonable person in the suspect's position" is always a reasonable adult, even where it is known and apparent to the interrogating officer that the person being interrogated is a juvenile.[16]

[15] The Solicitor General argues that any ambiguity about whether respondent was legally required to attend the interrogation "was dispelled upon the arrival of respondent and his parents at the station, when Comstock explicitly sought and received the parents 'permission for [her] to interview their son.'" S.G. Br. 25-26. However, from Michael's point of view, the fact that Detective Comstock asked his parents whether she could interrogate him (and that they said yes) would only have solidified his perception that he had no choice but to answer Comstock's questions. Custody looks at the world from the point of view of the person who is being interrogated, not the point of view of his parents. "The relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Stansbury*, 511 U.S. at 324 (quoting *Berkemer*, 468 U.S. at 442).

[16] The federal courts at appeal have consistently held that *Miranda* and its progeny requires officers to consider facts actually known to them at the time of questioning in deciding whether the administration of the *Miranda* warning is necessary. *United States v. Ozuna*, 170 F.3d 654, 659 (6th Cir. 1999) (court considered perception of a reasonable person with language difficulties); *United States v. Erving L*, 147 F.3d 1240, 1247-48 (10th Cir. 1998) (court considered a reasonable juvenile in the defendant's position.); *United States v. Chalan*, 812 F.2d 1302, 1307 (10th Cir. 1987) (court considered the defendant's adherence to tribal custom in the custody analysis.); *United States v. Beraun-Panez*, 812 F.2d 578, 580-81 (9th Cir. 1987) (court considered status as an alien in reasonable person analysis.); *United States v. Wauneka*, 770 F.2d

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Petitioner and the Solicitor General argue that consideration of age is irrelevant to "in custody" determinations[17] since it would improperly convert the "in custody" test from an objective test into a subjective test like the one employed for voluntariness determinations.[18] Pet. Br. 29, 37-38; S.G. Br. 10-11, 17. As will be discussed in more detail below, that is not correct.[19]

Consideration of juvenile status does not convert an objective test into a subjective test. Juvenile status is not a "peculiar mental or emotional condition" that would serve to destroy the objective nature of the test. Moreover, contrary to petitioner's position, a reasonable juvenile standard would not "require[ ] law enforcement to calibrate their actions to account for how they might be perceived by an "unreasonable" person with a juvenile's age and experience." Pet. Br. 37. Rather, it is most often,[20]

1434, 1438-39 (9th Cir. 1985) (court considered that defendant was only 18 years old.).

[17] It is ironic that although Detective Comstock used respondent's youth to her advantage in securing an incriminating statement, the government argues that youth should be irrelevant to custody determinations. Pet. Br. 29; S.G. Br. 10.

[18] The voluntariness of a confession is determined by a subjective test which focuses on whether a *particular* suspect's will was overborne by coercive police activity. *Dickerson*, 530 U.S. at 444 (emphasis added).

[19] Making youth irrelevant to the custody determination, and thus making every child a reasonable adult, would effectively ignore whether a suspect was 17, 14, 10 or even 6 years old. That simply is absurd. It cannot be reasonably argued that, had all the other circumstances remained the same except for the fact respondent was only ten years old, that the appropriate reasonable person standard would be that of a reasonable adult.

[20] It was not the case here, and rarely will it be true, that exigent circumstances exist during post-offense station house interrogation of a

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and as was true here, age is an objectively knowable fact, and known to the officer at the time of questioning. The law has long given controlling weight to juvenile status in innumerable legal contexts, including interrogation because it creates a vulnerability repeatedly noted by this Court as requiring additional care and concern in police citizen interactions.[21] Consideration of juvenile status in the reasonable person inquiry would not take into account the particular child's or police officer's subjective assessment of the situation, nor their peculiar states of mind. Nor would it require the police to anticipate the "frailities or idiosyncracies of every person whom they question." Pet. Br. 32. Instead, it is simply a matter of calibrating the correct objective standard against which to assess the circumstances surrounding the interrogation. This objective test asks how a reasonable person – in this case how a reasonable seventeen-year-old – brought to the police station by his parents, at the insistence of the police, and

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suspect. Therefore, the burden on police officers to determine the age of a suspect will be negligible. Once a suspect has been brought in for questioning, his or her age is generally known.

[21] *See Stein v. New York*, 364 U.S. 156, 185-86 (1953) (characteristics of the accused relevant in determining voluntariness of a confession include the accused's age), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964). In *Haley v. Ohio*, 332 U.S. 596 (1948), this Court established the legal principle that juveniles are, in general, more susceptible to police coercion than adults; as such, due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation. *Id.* at 599-601. During the last half century, this Court has consistently reaffirmed this principle. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 693 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

then separated from them against his will and his parent's will, would have assessed his freedom to leave.[22] In short, consideration of juvenile status in the reasonable person inquiry in no way converts the objective test adopted by this Court for custody determinations into a subjective inquiry.[23]

This Court recognized recently, in a Fourth Amendment custody analysis, that all circumstances surrounding the encounter – including juvenile status – should be taken into account in assessing whether police conduct communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. *See Kaupp v. Texas*, __ U.S. __, 123 S. Ct. 1843, 1846 (2003) (taking into account that suspect was "a seventeen year old boy" as a "probative circumstance" in determining whether the juvenile had been seized for purposes of the Fourth Amendment.) Although this Court has distinguished between custody for Fifth Amendment

[22] The Solicitor General asserts that "nothing in the record indicates why respondent's parents were not present in the interview room" and that "there are no state court findings on the subject." SG. Br. 27. A fair review of the record belies this assertion. It is, and has always been, undisputed that Michael's parents were refused permission to be with him during the interrogation. Pet. for Cert. 3, Pet. App. A8, B3; J.A. 185-186, 190. In fact, it was accepted by the trial court and uncontradicted by the government at the pre-trial suppression hearing that not only did Michael's parents request to be present, Michael himself asked something to the effect of "Can't someone come in with me or be here with me?" J.A. 185-186, 190-194.

[23] The concept of a reasonable child is recognized in other areas of the law, e.g., torts, in applying the reasonable person standard. *Daniels v. Evans*, 224 A.2d 63 (N.H. 1966) "Minors are entitled to be judged by standards commensurate with their age."; *see also* Holmes, *The Common Law* 107-09 (1881).

purposes and custody for Fourth Amendment purposes,[24] the tests are similar and the reasons which compel the consideration of juvenile status is the same.[25] When considering the circumstances surrounding an interrogation, a reviewing court must acknowledge that a seventeen-year-old is still considered a juvenile. There is no principled reason why age should not also be acknowledged as relevant to Fifth Amendment custody determinations.

To equate a juvenile interacting with police officers with an adult interacting with police is to completely divorce reason from the "reasonable" person inquiry. It is this common understanding of a reasonable person, or in this case, a reasonable seventeen-year-old, which has led all courts that have squarely addressed the issue to recognize juvenile status is relevant to the "in custody" determination, either as a factor under the totality of circumstances test, or by way of modification to the reasonable person standard.[26] State courts have also acknowledged the

[24] *See Berkemer*, 468 U.S. at 437, 441-42 (holding that a person could be "seized" or "detained" for purposes of a traffic stop, but not "in custody" for purposes of *Miranda*).

[25] "A seizure of a person within the meaning of the Fourth and Fourteenth Amendments occurs when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Kaupp*, 123 S. Ct at 1845 (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). "The test is an objective one." *Id.* at 1847.

[26] *See In re Jason W.T.*, WI App. 241, ¶ 15 (Wis. Ct. App. 2002) (ruling that in applying the objective test, it is appropriate to ask what a reasonable child in the defendant's circumstances would understand his situation to be.); *In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. 2002) (ruling that objective test applies to juvenile context, "but

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with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement"); *Evans v. Montana*, 995 P.2d 455 (Mont. 2002) (finding that a 'reasonable fourteen-year old being questioned under the circumstances would surely not have felt free to leave.'); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to determine whether the defendant "would have believed that he was in custody at the time of the interrogation at the police station"); *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. Crim. App. 1999) (surveying the large number of state courts that have included age as a factor in an "in custody" determination and adopting a rule that "expressly provides for consideration of age under the reasonable-person standard established [by the U.S. Supreme Court] in *Stansbury*") (emphasis added); *State v. D.R.*, 930 P.2d 350, 353 (Wash. Ct. App. 1997) (applying standard of "whether a 14 year old in [the defendant's] position would have reasonably supposed his freedom of action was curtailed" and holding that in the context of school interrogations, special precautions should be taken to ensure that children understand that they are not required to stay or answer questions asked of them by a police officer.) (quotations omitted); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) (stating that a juvenile in-custody determination "must consider additional factors, such as the juvenile's education, age, and intelligence"); *In re Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (ruling that objective test applied to in-custody determination for Miranda purposes, "but with additional elements ... including the child's age, maturity and experience with law enforcement"); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (en banc) (ruling that "the circumstances of the interrogation, including the length of the interrogation and the fact that it involved an eleven-year-old, would lead a reasonable person in [the defendant's] situation to feel that he had no choice but to stay and listen to the officer") (quotations omitted); *In re Loredo*, 865 P.2d 1312, 1315 (Or. Ct. App. 1993) (constructing test "whether a reasonable person in child's position – that is, a child of similar age, knowledge and experience, placed in a similar environment – would have felt required to stay and answer all of [the officer's] questions"); *In re Robert H.*, 194 A.D.2d 790, 599 N.Y.S.2d 621, 623 (1993) ("Under the circumstances, we conclude that a reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene."); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988) ("On the question whether the juvenile was in custody, the test is how a reasonable person in the juvenile's position

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absence of parents as a relevant factor under the totality of circumstances. *See, e.g., In re Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (ruling that objective test applied to in custody determination for *Miranda* purposes, "but with additional elements ... including ... the presence of a parent or other supportive adult"); *State v. J.Y.*, 623 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 1993) (considering "juvenile's age" and "lack of a parent being present" as relevant factors under the totality of circumstances).

If Michael Alvarado had been an adult, he would not have been bound to abide by a housemate's agreement to have him come to the police station. However, because respondent was a minor, and the housemates were his parents, he did not have that freedom of choice.[27] Once at

would have understood his situation."); *People v. Savory*, 435 N.E.2d 226, 230 (Ill. App. Ct. 1982) (stating that "[n]umerous factors" are relevant to the in custody determination, including "the age, intelligence and mental makeup of the accused"). In addition to these state court decisions several federal courts of appeals have also recognized the age of the suspect in making the decision whether *Miranda* warnings were necessary to prevent Fifth Amendment violations. In *United States v. Erving L.*, 147 F.3d at 1247-48, the Tenth Circuit expressly assessed the facts through the eyes of a "reasonable juvenile" in determining the suspect was not in custody. Likewise, in *United States v. Wauneka*, the Ninth Circuit considered the fact that the suspect was eighteen years old at the time of interrogation in deciding that a *reasonable person in the suspect's shoes* would not have felt free to leave. 770 F.2d 1434, 1438-39 (9th Cir. 1985).

[27] "A parent is the natural guardian of the person of his child and is entitled to custody and control." 10 Witkin, Summary of California Law § 91 (9th ed. 1989); The authority of a parent only ceases on any of the following: (a) The appointment, by a court, of a guardian of the person of the child; (2) the marriage of the child; or (3) the child attaining age of majority. Cal. Fam. Code § 7505; *see also* Cal. Welf. & Insts. Code § 601 [persons under the age of 18 years who persistently or habitually refuse to obey the reasonable and proper orders or directions of his or

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the police station, if respondent had been an adult, the police would not have asked the person who brought him there for permission to question him; they would have asked him, and he would have been able to decide for himself whether to grant or (attempt to) refuse that permission. If Michael had been an adult, the police refusal to allow his companion(s) to accompany him to the room for questioning would have been unsurprising and inconsequential to him, but because he was a minor and the companions were his parents, that refusal was highly significant as a practical and legal matter.[28] It cannot seriously be suggested that when Detective Comstock began questioning Michael, a reasonable seventeen-year-old in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home at any time.

In sum, the state court's failure to take this widely recognized understanding of the reasonable juvenile into account in its custody analysis in Michael's case was inconsistent with the longstanding objective reasonable person standard.

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her parents is within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court.]

[28] Petitioner argues that under the Ninth Circuit holding, respondent's "age and experience would have been irrelevant had he been interviewed less than six months later." Pet. Br. 38. However, six months later, Comstock likely would not have called his parents to get them to bring him to the station, nor would she have needed "their permission" to interrogate him. The circumstances surrounding the interrogation likely would have been markedly different. Futhermore, any legal test, legal line drawing, or "bright line" rule will have cases which fall close to the line on one side or the other. The fact that a case is close does not mean that the rule is a bad rule or should be discarded.

C. Law Enforcement's Duties Under *Miranda* Will Remain the Same.

Petitioner argues that requiring officers to take into consideration a suspect's age and experience in deciding whether to give *Miranda* warnings will "unduly hamper" law enforcement. It is difficult to see how this is the case. In every interrogation, an officer must think about how his or her actions impact upon the suspect's assessment of her freedom to leave. That is especially true in this case where, the officer makes a deliberate, tactical decision to conduct a station house interrogation of a known suspect without administering the *Miranda* warnings.[29] The age of a suspect, particularly as known or exploited by the police, is relevant to whether a suspect waived his or her *Miranda* rights and to the voluntariness determination. Since the suspect's age is already a factor in the ultimate admissibility of any statement, it is not a heavy burden on law enforcement to utilize a reasonable juvenile standard in assessing custody for *Miranda* purposes, especially when the officer knows the suspect is a juvenile.

Petitioner also asserts that factoring a juvenile's age and experience into the "custody" determination would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters. Pet. Br. 39. However, the

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[29] It cannot be seriously disputed that Officer Comstock chose to proceed without giving the *Miranda* warnings to enhance her chances of securing an incriminatory statement. This was not a spontaneous or road side encounter. Comstock was an experienced, trained police officer who had summoned a known suspect in a homicide case to the police station for the purpose of interrogating him. It is readily apparent that she chose not "*Mirandize*" Michael for fear he would invoke either his right to silence or his right to counsel.

Miranda custody inquiry is often one of "shades and degrees." *Withrow v. Williams*, 507 U.S. 680, 712 (1993) (O'Connor J., concurring in part and dissenting in part). Requiring officers to ask how a reasonable juvenile would assess his interaction with police does not make the water any "muddier," it merely requires that the law be logical, and that the correct reasonable person standard be utilized. Additionally, clarity cannot be allowed to eclipse fairness. Petitioner's argument necessarily means that any child or adolescent, no matter what his age, would be held to the standard of a reasonable adult in assessing custody. Clarity which leads to absurd results should not be countenanced.

Petitioner further contends that "An overly broad *Miranda* rule for juveniles would potentially exclude free and voluntary confessions deserving of the highest credit." Pet. Br. 9. This argument proves too much, as it would require this Court to overrule *Miranda* itself. The same argument can be made any time a confession is excluded because it was obtained in violation of *Miranda*. However, "a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by flattery of hope, or by torture of fear, comes so questionable a shape . . . that no credit ought to be given it." *Dickerson*, 530 U.S. at 433. Finally, an unduly narrow view of custody for juveniles would mean that those most in need of the protections afforded by *Miranda* would be denied its protections in cases where no reasonable child, teenager, or adolescent would feel free to leave.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WHICH DETERMINED THAT RESPONDENT WAS NOT IN CUSTODY AT THE TIME HE WAS INTERROGATED WAS BOTH CONTRARY TO AND AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THIS COURT.

A state court decision is contrary to clearly established federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court decision involves an unreasonable application of clearly established federal law if the state court "identifies the correct governing legal principle from this Court's decisions, but unreasonably applies that principle to the facts of the petitioner's case." *Id.* at 413; *see also Wiggins v. Smith*, 123 S. Ct. 2527, 2534 (2002). In other words, a "federal court may grant relief when a state court has misapplied a 'governing legal principle' to a 'set of facts different from those of the case in which the principle was announced.'" *Wiggins*, 123 S. Ct. at 2535 (internal citations omitted) (quoting *Lockyer v. Andrade*, 538 U.S. 63, ___, 123 S. Ct. 1166, 1175 (2003)).[30] In short, the relevant

[30] As will be discussed subsequently, a state court decision is also unreasonable if it "either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407 (O'Connor J., concurring).

inquiry is whether the state court decision was "objectively unreasonable." *Williams*, 529 U.S. at 409.[31]

A. The California Court of Appeal Unreasonably Failed to Consider the Totality of the Circumstances Identified in this Court's Prior Decisions.

As has been previously discussed, determining whether a suspect is in custody involves a two step analysis: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112-13. "The first inquiry . . . is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a 'mixed question of law and fact'. . . ." *Id.*

"In determining whether an individual was in custody, a court must examine *all* of the circumstances surrounding the interrogation, ... " *Stansbury*, 511 U.S. at 322. (emphasis added); *see also Thompson*, 516 U.S. at 112; *Berkemer*, 468 U.S. at 442. Circumstances which this Court has identified as particularly relevant to the custody inquiry include: where the interrogation occurred, at the police station or in a more public location, *Berkemer*, 468 U.S. at 437-39; how the suspect came to the place of

[31] A state court decision can be both "contrary to" and an "unreasonable application of" clearly established federal law under § 2254(d)(1). *Williams*, 529 U.S. at 413.

interrogation, did the suspect come voluntarily, *Mathiason*, 429 U.S. at 495; whether the suspect was affirmatively told that he was not under arrest, *id.*; *Beheler*, 463 U.S. at 1122; how long the interrogation lasted, *Beheler*, 463 U.S. at 1122; and, whether weapons were brandished. *Orozco v. Texas*, 394 U.S. 324 (1969).[32]

The state court completely ignored most of these important factors, and myopically determined that Michael was not in custody because he was "not told he could not leave until he told the truth," and because "he was not subjected to the intense and aggressive tactics" Pet. App. C17. But, in this case, one of the most important aspects to properly (and reasonably) decide whether Michael was in custody was how he came to the police station to be interviewed in the first place. Officer Comstock contacted his parents, informed them that she "needed" to speak with him, and enlisted the custodial authority of Michael's parents to secure his presence at the police station. He did not, as was the case in *Mathiason* and *Beheler,* voluntarily come to the police station. On arrival at the station, Comstock did not ask Michael if he would agree to be interviewed, she asked his parents.[33] They agreed to the interrogation. Thus he came to the police station in the custody of his parent, and he was then transferred from

[32] In some cases, the interrogating officer's knowledge that the person being interrogated is a suspect is also a relevant factor. The officer's knowledge or belief goes into the totality of circumstances hopper if it is "conveyed to the individual being questioned." *Stansbury*, 511 U.S. at 325.

[33] Furthermore, Michael was not given a statement to review or sign indicating that he voluntarily agreed to be interviewed by the police.

his parents' custody to police custody. Furthermore, his request, and his parents' request, that his mother and father be allowed to accompany him into the interview room were summarily rejected by Officer Comstock.[34] Additionally, Michael was never told that he was not under arrest prior to the interrogation. The state court unreasonably focused on the converse: that Michael was not told that he could not leave. However, a key consideration in both *Matthiason* and *Beheler* was the fact that the suspect was affirmatively told that he was not under arrest. *Matthiason*, 429 U.S. at 495; *Beheler*, 463 U.S. at 1125. Finally, Michael was informed that he was a suspect and he was interrogated for more than two hours.[35]

These circumstances, clearly identified in this Court's prior decisions, are undoubtedly critical in correctly setting the scene, but they were not given any meaningful consideration by the California Court of Appeal in its

[34] In *Berkemer*, 468 U.S. at 442 n.36, this Court contrasted the suspect in that case's situation with that of the suspect in *United States v. Schultz*, 442 F. Supp. 176 (1977). In *Schultz*, an adult suspect was held to be in custody for *Miranda* purposes, after being denied permission to call his mother. This Court used the "cf." signal, which, in context, indicates that the custody determination in *Schultz* was correct.

[35] It is also significant that the interview was tape recorded. This could only have served to add to its official air. Furthermore, Michael had virtually no prior experience with law enforcement and certainly none with police interrogation techniques: *Cf. Murphy*, 465 U.S. at 433 ("[M]any of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the [Fifth Amendment] privilege").

determination that respondent was not "in custody" for *Miranda* purposes.[36] In sum, the state court failed to consider the appropriate totality of the circumstances, but rather selectively focused on a few factors which supported its conclusion. As was true in *Wiggins*, this makes the state court's decision more of a "*post-hoc* rationalization" rather than an "accurate description" of the relevant facts. *Wiggins*, 123 S. Ct. at 2538. The failure to take into account a number of circumstances deemed highly probative in this Court's established custody decisions renders the state court decision objectively unreasonable.[37]

[36] The Ninth Circuit decision correctly identified the totality of the relevant circumstances, including those ignored or given no weight by the state court:

> Detective Comstock contacted Michael's mother at her place of employment and informed her that the police "needed" to speak with her son. Both parents then accompanied Michael, who was then only 17 years old, to the Sheriff's station so that he could be interviewed. Despite the fact that Michael had never been questioned by police before, his parents were refused permission to be present during the interview. Michael was then escorted to an interrogation room, where Detective Comstock conducted a two-hour interview about the events of September 22, 1995. Despite the fact that Michael initially denied any knowledge or involvement in a crime, Comstock repeatedly pressured Michael to tell the "truth" as purportedly disclosed by the three notebooks of notes she had compiled from her interviews with alleged witnesses to the crime. Well into the course of the interview, after a substantial amount of incriminating material had been obtained, Michael was told that he could use the phone. Only at the end of the interview did Comstock inform Michael that he was free to go.

Alvarado v. Hickman, 316 F.3d 841, 844 (9th Cir. 2002).

[37] For example, in the two cases from this Court holding that station house interrogation by the police was not custodial, the person questioned – an adult in both instances – (1) went to the station voluntarily; (2) was affirmatively told he was not under arrest; and (3) was interviewed for less than a half hour. *Beheler*, 463 U.S. at 1122;

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B. The California Court of Appeal Utilized an Erroneous Reasonable Person Standard Thus Rendering that Decision Contrary to and Unreasonable Application of Clearly Established Federal Law.

The second prong of the custody determination requires a reviewing court to ask whether a reasonable person in the suspect's position would have believed that he or she was at liberty to terminate the interrogation and leave. *Thompson*, 516 U.S. at 113-14; *Berkemer*, 468 U.S. at 442. Because the relevant totality of the circumstances was materially incomplete, the application of the legal principle to the circumstances of this case was necessarily wrong and contrary to, and an unreasonable application of, clearly established federal law. In this case, considering all the facts relevant to the totality of the circumstances, no reasonable person–adult or juvenile–would have believed he was free to leave.

The California Court of Appeal compounded the error when it invoked and relied on the wrong legal standard, applying the "reasonable adult" test. The use of an incorrect legal standard was both contrary to, and an unreasonable application of, clearly established federal law.[38]

Mathiason, 429 U.S. at 495-96. In this case, Michael did not come to the station voluntarily, he was brought by his parents at the interrogating officer's request. Second, he was not told he was not under arrest prior to the interrogation. Third, the interview lasted two hours.

[38] The Ninth Circuit held that the state court was unreasonable in failing to consider that Michael was a juvenile:

> The omission of any mention of Michael's juvenile status (and Comstock's knowledge of it) by the California Court is mysterious because Alavarado raised this precise argument both at trial and on

(Continued on following page)

Due to the universally recognized relevancy of juvenile status in *every other* legal context, the state court's refusal to consider Michael Alvarado's juvenile status as relevant to either the totality of the circumstances, or the calibration of the correct reasonable person in making the *Miranda* custody determination, was objectively unreasonable. There is simply no principled justification for a *Miranda* custody exception to the rule that juvenile status "matters." The custody calculus under *Miranda* does not occupy such a special place in this Court's jurisprudence compelling such an unwarranted and unreasonable rule, a rule which effectively treats a twelve-year-old and an adult alike.

The notion that it was an "open question" whether to consider juvenile status in the "custody" determination for purposes of requiring *Miranda* warnings prior to police questioning, or that such a notion was so new that it broke new legal ground or imposed new and unforeseen obligations on the states, is simply untenable. In Section I of this brief, we have explained the state courts' unanimity on this point. That unanimity, recognized by the Ninth Circuit in this case, puts to rest the argument that the

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> appeal. There is no support for the argument that his juvenile status finds no mention in the California decision because of Michael's failure to raise and preserve the issue in every state forum. Michael's trial attorney argued that because Michael's parents brought him to the station at the behest of the police who refused them permission to be present at the interview; because Michael was a juvenile who had never before been arrested; and because Alvarado was interrogated for over two hours in an interrogation room where he was a suspect, a reasonable person in his position would not have felt free to leave.
>
> J.A. 185-197; *Alvarado*, 316 F.3d at 850.

panel's decision imposes a new and unforeseen burden on the states. *See Alvarado v. Hickman*, 316 F.3d 841, 851 n.5 (9th Cir. 2002) ("When we survey the landscape of state court decisions, we note that every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the 'in custody' determination, either as a factor under the totality of circumstances test, or by way of modification to the reasonable person standard"). The uniformity of state court decisions, the decisions of this Court in similar contexts and the generally understood meaning of the reasonable person, all make clear that the state court's refusal to consider Michael's juvenile status was unreasonable. *Williams*, 529 U.S. at 397 (Virginia Supreme Court was unreasonable in failing to consider the "totality of the available . . . evidence").[39]

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[39] State court decisions and the decisions of lower federal court are not entirely irrelevant in federal habeas proceedings. Rather, they remain useful (and accepted by most circuits) in the task of identifying the content and scope of rules clearly established by the Supreme Court. *See, e.g., Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir.), *cert. denied*, 121 S. Ct. 340 (2000) ("there is still a role for circuit law in habeas cases: we still look to our own law for its persuasive authority in applying Supreme Court law; however, only the Supreme Court's holdings are binding on the state courts and only those holdings need be 'reasonably' applied"); *Richardson v. Bowersox*, 188 F.3d 973, 978 (8th Cir. 1999), *cert. denied*, 529 U.S. 1113 (2000) ("In determining whether a state court's decision involved an unreasonable application of clearly established federal law, it is appropriate to refer to decisions of the inferior federal courts in factually similar cases"); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir.) (en banc), *cert. denied*, 528 U.S. 824, 890 (1999) ("in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent").

C. Because The California Court Of Appeal's Decision Was Both "Contrary To" And Involved An "Unreasonable Application Of" Clearly Established Federal Law, This Court Need Not Decide Whether The United States Court of Appeals Was Also Correct Under The "Unreasonable Extension" Prong of § 2254(d)(1).

Petitioner spends a great deal of time addressing whether the "extension of legal principles" analysis is governed by, or indeed, even finds a home in § 2254(d)(1). But, for the most part, the extension debate is tangential to the proper resolution of this case. While the Ninth Circuit did ground its decision on an "extension of legal principles" analysis, that analysis is not essential to its judgement that Michael Alvarado was in custody. What is dispositive, however, is that the California Court of Appeal decision was both contrary to and an unreasonable application of this Court's well established custody decisions in: (1) refusing to consider several critical factors in the identification of the totality of the circumstances; and (2) refusing to consider Michael's juvenile status in the reasonable person inquiry. Therefore, this Court need not consider Petitioner's argument that the Court of Appeals erroneously extended the law since it was the state court which failed to identify what the law is (and has been) and to reasonably apply the established law to the relevant facts. The state court decisions, under any standard, was objectively reasonable.

Under the guise of attacking the Ninth Circuit's decision, Petitioner repeatedly misstates the relevant § 2254(d)(1) question before this Court. For example, Petitioner asserts that the panel "extrapolat[ed] a rule" in

deciding this case. Pet. Br. 7. But, as has been previously established, no rule is being "extrapolated" at all. Petitioner also uses the term "later emerging legal doctrine." *Id.* Again, no "later emerging doctrine" is necessary to properly resolve this case.

Petitioner also argues that "an extension of a legal principle to a novel setting is not an application . . . because 'application' and 'extension' have different meanings." Pet. Br. 7-8. This is faulty semantics in the service of faulty reasoning. "Application" plainly subsumes "extension." Section 2254(d)(1) anticipates that lower federal courts will apply established rules to situations not explicitly covered by this Court's decisions, *i.e.*, to state court judgments which are not "on all fours" with one of this Court's decisions. Even in the new rule context governed by the *Teague v. Lane*, 489 U.S. 288 (1989) retroactivity analysis, this Court was aware that lower courts would have to reasonably determine whether the case before them required the application of a new rule or merely the proper extension or application of a recognized old one. This Court noted:

> Referring to *Teague*, we reiterated that, in general, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government. *Penry*, 492 U.S., at 314. . . . A new decision that explicitly overrules an earlier holding obviously "breaks new ground" or "imposes a new obligation." *In the vast majority of cases*, however, where the new decision is reached by an *extension* of the reasoning of previous cases, the inquiry will be more difficult.

Butler v. McKellar, 494 U.S. 407, 412-13 (1990) (emphasis added).

Similarly, petitioner argues that because the "extension" of "clearly established federal law" *itself* constitutes a "new rule" as that term is described and defined in this Court's *Teague* jurisprudence, it is improper to apply the "new rule" to Michael Alvarado's case under both the non-retroactivity doctrine and § 2254(d)(1). This bootstrapping argument evaporates under close scrutiny. If a federal court's faithful attempt to follow the guidelines of § 2254(d)(1) by applying clearly established federal law to an analogous context is inevitably met with a challenge that such application constitutes a "new rule" in violation of the non-retroactivity doctrine of *Teague*, then there would be, for all practical purposes, no habeas corpus review. Such an approach would preclude a federal court from granting habeas relief to a state prisoner if the claim could be distinguished from prior precedent on any conceivable legal or factual basis. But adjudication according to prevailing law necessarily means more than perfunctorily applying holdings in previous cases to virtually identical fact patterns. Indeed, even in Justice Harlan's view, adjudication according to prevailing law demands that a court exhibit "conceptual faithfulness" to the principles underlying prior precedents, not just "decisional obedience" to cases on all fours with a decision of this Court. *Desist v. United States*, 394 U.S. 244, 266 n.5 (1969) (Harlan, J., dissenting).

D. This Court And The Federal Circuits Have Adopted The Extension Analysis Under 28 U.S.C. § 2254(d)(1) Because There Is A Logical And Legal Equivalence Between The Terms "Application" And "Extension" Recognized By This Court.

In finding the state court's decision in this case to be unreasonable under AEDPA, the Ninth Circuit utilized the "extension" analysis referenced by this Court in *Williams v. Taylor*. In *Williams*, this Court stated that the construction in *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), of the unreasonable application clause was "generally correct." *Williams*, 529 U.S. at 407. That construction held that the unreasonable application clause allowed a federal habeas court to examine whether the state court "either unreasonably extended a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* Had this Court found such a construction anathema to its understanding of the scope of § 2254(d)(1), it surely would have said so. In *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000), Justice Kennedy's plurality opinion recapitulated the *Williams* formulation of the "extension" language without comment or dissent. It appears, therefore, that this Court has adopted the extension test as part of its settled § 2254(d)(1) unreasonable application law.

Additionally, all of the federal courts of appeal have referenced, even if in some instances they have not formally adopted, the "extension" prong of the "unreasonable

application" clause of § 2254(d)(1).[40] That is for good reason since there is little semantic or logical difference between

[40] *See, e.g., Kibbe v. Dubois*, 269 F.3d 26, 36 (1st Cir. 2001); *Mountjoy v. Warden*, 245 F.3d 31, 35 (1st Cir. 2001) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)) ("[A] state court decision may be set aside as an 'unreasonable application' of federal law . . . 'if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply' "); *Kennaugh v. Miller*, 289 F.3d 36, 44-45 (2d Cir. 2002) ("A state court determination is reviewable under AEDPA if the state decision unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to situations which that principle should have, in reason, governed."); *Williams v. Price*, 343 F.3d 223, 229 (3d Cir. 2003) (citing *Williams*) ("Accordingly, to hold that the right recognized in *McDonough* is not available to a defendant in a state criminal case would be an 'unreasonabl[e] refus[al] to extend that principle to a new context where it should apply' "); *Green*, 143 F.3d at 869-70; *Penry v. Johnson*, 215 F.3d 504, 507-08 (5th Cir. 2000) (citing *Williams*) ("[a] state court unreasonably applies Supreme Court precedent if . . . it 'unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply' "), *rev'd on other grounds*, 532 U.S. 782 (2001); *McMeans v. Brigano*, 228 F.3d 674, 684 (6th Cir. 2000) (same); *Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. 2000) (same); *Armstrong v. Bertrand*, 336 F.3d 620, 624 (7th Cir. 2003) (citing *Williams*) ("if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply"); *Carter v. Kemna*, 255 F.3d 589, 592-593 (8th Cir. 2001) (citing *Williams*) ("[a] state court decision involves an unreasonable application of Supreme Court precedent when the state court unreasonably refuses to extend a legal principle to a new context where it should apply"); *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000); *Valdez v. Ward*, 219 F.3d 1222, 1229-30 (10th Cir. 2000); *Carter v. Ward*, No. 02-6307 (10th Cir. Oct. 21, 2003) (same); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000) (same); *but see Hawkins v. Alabama*, 318 F.3d 1302 (11th Cir. 2003) (noting that the law is unsettled).

determining whether a state court has unreasonably applied clearly established law to an analogous context in which it reasonably should find purchase, and determining whether a state court has unreasonably extended (or failed to extend) clearly established law to that same context. "Applying" the law to an analogous context in the proper case is plainly synonymous with "extending" (*e.g.*, *applying* it to its full or proper *extent*) in the same context. This Court has suggested that a reasonable "application" of an old rule to a new context is the legal equivalent of "extending" it. One must presume that the equivalence bestowed upon the terms by this Court found expression in § 2254(d)(1), and in the cases that have construed an equivalence between the terms "apply" and "extend." *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler*, 494 U.S. at 412-13; *see also Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It is not unreasonable, therefore, to assume that the words "apply" and "extend" are used synonymously in interpreting § 2254(d)(1) without doing violence to the meaning or the intent of AEDPA. In sum, AEDPA is no barrier to habeas corpus relief because the California Court of Appeal incorrectly formulated the correct governing legal rules and unreasonably applied the governing legal rule to the facts of Michael Alvarado's

case.[41] The state court decision was, under any construction of § 2254(d)(1) objectively unreasonable.

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[41] In *Lockyer v. Andrade*, 538 U.S. 63 (2003), this Court concluded that Ninth Circuit precedent endorsing a "clear error" view of § 2254(d)(1)'s "unreasonable application" prong was incorrect. The panel in this case employed the "clear error" analysis under then binding Ninth Circuit precedent. *See Alvarado*, 316 F.3d at 854-855. While the panel in this case did not have the benefit of *Lockyer* at the time it decided this case, *Lockyer* has no impact upon the soundness of the result in this case because the panel also unquestionably found that the state court decision was unreasonable. *Id.* ("After identifying these relevant circumstances, it is simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was 'at liberty to terminate the interrogation and leave')."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 02-1684

In The Supreme Court of the United States

MICHAEL YARBOROUGH, Warden of California State Prison – Los Angeles County,

Petitioner,

v.

MICHAEL ALVARADO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

This supplemental brief is filed, pursuant to Rule 25.5[1] of the Rules of this Court, in order to furnish the Court with the Supreme Court of Illinois' recent decision in *People v. Braggs*, No. 95350, 2003 WL 22967264 (Ill. December 18, 2003). The opinion was issued on the day before Respondent's Brief on the Merits was due in this case. However, it was not publically available in time to be included in Respondent's brief.

Braggs is relevant to Respondent's first Question presented – whether the totality of the circumstances known by the police officer surrounding the interrogation must be assessed and necessarily intertwined with the second prong of the custodial question – the reasonable-person standard, in determining "custody" for *Miranda* purposes. The Supreme Court of Illinois held that, in making the custody determination, the reasonable-person standard must take into account a suspect's known mental retardation because it may affect how a reasonable person in the suspect's position would have assessed their freedom to terminate the interrogation and leave.

Accordingly, for the Court's convenience, we are setting forth in an appendix to this supplemental brief the

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[1] Supreme Court Rule 25.5 states:

> A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

decision of the Supreme Court of Illinois in *People v. Braggs*.

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2003 WL 22967264

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Illinois.

The **PEOPLE** of the State of Illinois, Appellant,
v.
Mary **BRAGGS**, Appellee.

No. 95350.

Dec. 18, 2003.

Justice RARICK delivered the opinion of the court:

Defendant, Mary Braggs, was charged in the circuit court of Cook County with two counts of first degree murder for the deaths of Connie Hall and Donald Rudolph. After refusing to conduct a hearing on defendant's pending motion to suppress statements, the circuit court determined that defendant was unfit to stand trial due to the severity of her mental retardation. The court thereafter conducted a discharge hearing, found the State's evidence sufficient to establish defendant's guilt beyond a reasonable doubt, and remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years. Defendant appealed.

The appellate court reversed and remanded. *People v. Braggs,* 302 Ill.App.3d 602, 236 Ill.Dec. 327, 707 N.E.2d 172 (1998). Holding that the circuit court had erred when it refused to conduct a suppression hearing, the appellate court remanded the cause for a hearing on defendant's motion to suppress. The appellate court also concluded

that the evidence was sufficient to establish guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the circuit court conducted a hearing on defendant's motion to suppress, hearing testimony from the investigating detective, a psychiatrist, a clinical psychologist, and an assistant State's Attorney who had interviewed defendant after she was formally arrested. The court ultimately ruled defendant was not competent to waive her *Miranda* rights, and consequently granted defendant's motion with respect to statements made to the assistant State's Attorney after defendant's arrest. However, the court did not suppress an inculpatory statement defendant allegedly made to detectives shortly before she was formally arrested, concluding that defendant was not then in custody, there was no evidence of police coercion or misconduct, and the statement was, therefore, admissible. The circuit court determined that a new discharge hearing was not necessary and reinstated the original order committing defendant to the Department of Mental Health. Defendant again appealed.

The appellate court reversed and remanded, stating:

> "[W]hen the trial court ruled that Braggs' statements to the police were admissible because she was not in custody and *Miranda* was inapplicable, it was in error. Likewise, the court's ruling that, in the absence of police coercion or the defendant being in custody, the fact that Braggs was mentally handicapped was to be considered only as to the weight to be given her statements and not as to whether those statements were inadmissible, was in error. The court should have considered whether Braggs' statement to the detectives was voluntary in a state-law sense based upon the totality of the circumstances. [Citation.]

> One of the factors that the court should have considered was whether Braggs' mental retardation deprived her of 'the capacity to understand the meaning and effect of the confession.' [Citation.] This is particularly important in the present case, where the trial court found the defendant was incapable of waiving her rights under *Miranda* due to her diminished mental capacity." 335 Ill.App.3d 52, 65, 268 Ill.Dec. 861, 779 N.E.2d 475.

The appellate court remanded the cause for a new hearing on defendant's motion to suppress, directing the circuit court to conduct a new discharge hearing thereafter. 335 Ill.App.3d at 69, 268 Ill.Dec. 861, 779 N.E.2d 475. The appellate court observed, "much of the evidence presented at the motion to suppress hearing was unavailable to the court which conducted the 1996 discharge hearing." 335 Ill.App.3d at 69, 268 Ill.Dec. 861, 779 N.E.2d 475.

We granted the State's petition for leave to appeal (177 Ill.2d R. 315), and we now affirm, with modification, the judgment of the appellate court. We begin with a recitation of the evidence adduced at the suppression hearing.

Chicago police detective Edward Winstead testified that he investigated the deaths of Donald Rudolph and Connie Hall. The victims' bodies were both found in a first-floor apartment located on South Prairie Avenue in Chicago on April 28, 1993. Although officers initially thought that Rudolph had been beaten to death, it was later determined that Rudolph died as a result of strangulation. Hall died as a result of multiple stab wounds. During the

course of the investigation, Winstead began looking for defendant.

On May 7, 1993, Survilla Cameron contacted Winstead and informed him that defendant lived with her. Cameron represented herself to be defendant's sister and guardian; however, Winstead admitted he never saw any documentation to substantiate Cameron's claim. After Cameron indicated that Winstead could speak with defendant, Winstead transported defendant and Cameron to Area One and questioned her. Prior to questioning, Cameron informed Winstead that defendant was "mentally incompetent." Winstead admitted one could "clearly see that she was mentally deficient." Cameron agreed to help Winstead in his interrogation of defendant, but cautioned him that defendant was "slow." Winstead did not advise defendant of her *Miranda* rights. The interrogation took place in an interview room with another detective present.

Winstead testified he had difficulty communicating with defendant in that "sometimes she wouldn't answer questions," and other times she was "very slow in answering." In Winstead's own words: "She would be very slow in answering. And her sister would then kind of repeat the question or if Mary Braggs seemed to be paying attention to me she would then answer to her sister." If defendant responded, she would generally direct her answers to Cameron, and Cameron would then "tell [Winstead] what [defendant] was saying." However, Winstead testified he could hear defendant as she spoke. During the interrogation, Cameron acted as an intermediary for Winstead. Defendant's answers were responsive to Winstead's questions in the sense that defendant would respond to questions repeated by Cameron and first posed by Winstead.

Winstead summarized the substance of defendant's statements from the hour-long interrogation. According to Winstead, defendant told him that she was in the apartment on South Prairie Avenue when two black males came to the door. Defendant overheard an argument and hid in the closet. When she came out, defendant saw Hall dead in the bedroom. Defendant said Hall had been stabbed and was wearing white. Defendant said Rudolph was in the front room. He had been hit in the head with a wrench and had been strangled to death. Winstead testified that defendant's description was "very accurate as to how the victims died and where they were found." Following the interrogation, Winstead took defendant and Cameron home.

On the morning of May 9, Winstead again questioned defendant, this time at Cameron's apartment. As in all of the interviews, Cameron was present. Detective James Redmond was also present. Winstead said defendant was still very slow in answering questions, or she might not answer at all, but during this second interrogation, she at least spoke directly to him most of the time. Winstead testified he went to question defendant, a mere two days after the first interrogation, "to see if [he] could get a little bit more information, if she recalled more about the two black males who came to the door and the argument." Winstead testified that defendant told him one of the men was named Ron and he was a friend of Cleo. Defendant described the other man as a tall black male. Winstead testified that the investigation revealed Ron Thomas was an acquaintance of Cleo and the victims, and when Winstead located him he was with a tall black male named Mike.

Later that same afternoon, Winstead picked up defendant and Cameron and took them to Area One. Winstead spoke to defendant in an interview room. He indicated, as previously, it took defendant a long time to answer questions. "Often times [*sic*] she would put her head down and say 'I don't know.'" Winstead showed defendant photographs of Ron Thomas and Mike. Defendant quickly identified the photograph of Mike as being the tall black male. Winstead said she was at first uncertain of the identity of Ron Thomas, then she positively him. Winstead testified that when he informed defendant the men were at the police station, defendant changed her story. Defendant then said that these were not the two men who came to the apartment and that it was two different men. Defendant reiterated that two men came to the door and she hid in the closet.

Winstead testified that on that same afternoon he took defendant and Cameron to the scene of the murders. Defendant pointed out where the two bodies were found. Winstead testified that her account was consistent with where the bodies were found by the police. Defendant then showed Winstead the closet where she hid. Winstead testified he examined the closet and defendant "couldn't have possibly fit in there." Winstead then took defendant and Cameron home, having questioned defendant at three different locations over the course of the day.

On May 12, Winstead transported defendant and Cameron to the polygraph unit of the Chicago police department. Although defendant was cooperative, the polygraph examination was inconclusive because defendant did not register enough emotion. Again, defendant was returned to Cameron's apartment. Cameron and defendant subsequently changed residences.

On June 25, 1993, Winstead picked up defendant and Cameron from their new apartment and again took them to Area One for questioning. Prior to the questioning, Winstead informed Cameron that the police were looking at defendant as a potential suspect. Despite the State's representation otherwise, the record is silent as to whether that information was communicated to defendant. Winstead, another detective, defendant, and Cameron were present in the interview room. Winstead advised defendant of her *Miranda* warnings from a standard form without additional explanation. Defendant made no verbal response; she merely nodded her head in an affirmative manner. Although Winstead could not remember her exact words, he recalled that Cameron said something to the effect of: "he's telling you that you don't have to talk to me and that you're not going to be in trouble or something." Defendant nodded her head in agreement and "seemed to understand what her sister was saying." Defendant never verbally indicated that she understood, and she did not sign a waiver form. Indeed, it is unclear to what extent defendant ever responded to, or communicated with Winstead, He acknowledged that Cameron "initially" acted as an "interpreter," and it is obvious from the foregoing testimony that she was still acting in that capacity on June 25, 1993, despite Winstead's suggestion to the contrary: "After a while, after I talked to [defendant] somewhat, I could begin to understand or she'd answer me or she wouldn't." The record does not indicate whether Winstead's questions to defendant were suggestive or leading, or whether they called for a narrative response.

Although the transcript of the suppression hearing does not reveal the substance of statements defendant made during the June 25 interview, the testimony of

another detective from the discharge hearing indicated that defendant said she and Connie Hall were in an apartment together on April 28, 1993, when Donald Rudolph returned. Rudolph was drunk and struck both defendant and Hall. Defendant then knocked Rudolph down and he struck his head. Hall became upset, accusing defendant of killing Rudolph, and defendant then stabbed Hall a number of times in her upper body. Following the hour-long interview, defendant was placed under arrest. An assistant State's Attorney arrived at the police station and again advised defendant of her *Miranda* warnings.

Dr. Philip Pan, a psychiatrist, testified for the defense. On May 16, 1996, Pan diagnosed the defendant as having moderate mental retardation and determined defendant was unfit to stand trial. He noted that four other psychiatrists had reached the same conclusion. In 1996, Pan concluded it was not likely that defendant could be restored to fitness any time in the near future. On August 31, 1999, Pan again evaluated defendant. Dr. Pan testified that defendant was unfit for trial and would not become fit in the future. Pan also rendered his opinion that defendant was incapable of understanding *Miranda* warnings.

By way of explanation, Dr. Pan testified that defendant could give simple answers to questions she understood, but she was not capable of abstract thinking. Although she knew she was born in 1941, defendant told Dr. Pan, in the course of his 1999 interview, that she was 29 years old. Her thinking was "idiosyncratic," meaning that she was often "not on the same page" as the person questioning her. She would frequently answer questions in a completely irrelevant manner. When asked the meaning of her right to remain silent, she responded that she already had an attorney. When Pan asked her what it

meant that anything she said could be used against her in a court of law, she responded, "he know I didn't do those two crimes. That is something I didn't do."

Dr. Linda Wertzel, a clinical psychologist, also testified for the defense. Wertzel had examined defendant in 1994 and testified to her findings. Wertzel concluded that defendant was mentally retarded with an IQ of 54. Wertzel described her observations of defendant at that time:

> "[S]he was flat and passive, kind of emotionally blunted, no affect. She was overweight. She was-her clothing was dirty. Her hygiene was very poor. She was picking at her skin and nails and nose and ears. She was nonspontaneous in her speech."

Defendant could provide only "simple answers to direct questions and really did not provide a narrative of information." She stated her age to be 29. Testing revealed that defendant functioned, mathematically, at a kindergarten level. Defendant was unsure if she had ever gone to school. She could not read or write.

Wertzel administered a test designed to measure a person's ability to express thoughts accurately and coherently and to comprehend what other people say. She determined that defendant could only express herself at a "very simple childish level" and she could not comprehend more than a one-step command. Wertzel said the test involved asking the subject to touch colored shapes in sequence. Wertzel first asked defendant to touch a red square (one-step command), then asked her to touch a red square and a yellow circle in sequence (two-step command). Defendant could not get beyond the one-step command. Defendant was inconsistent in her ability to

identify shapes correctly. She displayed impairment on both motor speed and motor dexterity tests. She could not accurately draw and number the face of a clock.

When asked the meaning of various *Miranda* warnings, defendant either said she did not know or she offered an irrelevant or inappropriate response. Eventually, defendant became frustrated and the interview was terminated. As a result of her 1994 examination of defendant, Wertzel concluded that defendant was illiterate, mentally retarded, only minimally able to care for her basic daily needs, her comprehension of her current circumstances was marginal, and she was unable to understand her *Miranda* rights.

Wertzel examined defendant again in October 1999 and concluded she remained unable to understand her *Miranda* warnings. Dr. Wertzel testified that defendant's behavior was "pretty similar" to her first encounter with defendant. Defendant "acted as though she had only been in jail for about a week." She identified Kennedy as president of the United States. Wertzel administered the Peabody Picture Vocabulary Test, in which the subject is shown pictures and is asked to name activities or pastimes represented therein. Defendant scored the age equivalent of a five-year-old. After her 1999 examination of defendant, Wertzel again concluded it was "highly unlikely" that defendant ever had the ability to comprehend or waive *Miranda* rights.

Wertzel described defendant as "sort of like a child, * * * unsure of what is real and what is imagined, what is an actual memory, what is told to them." Moreover, she stated that defendant does not tolerate stress very well and is "suggestible." Wertzel described more than one

instance where she was able to lead defendant in the questioning to get the information desired.

In rebuttal, the State called Assistant State's Attorney Stan Gonsalves. Gonsalves testified he went to Area One on June 25, 1993, to interview defendant. Prior to meeting defendant, detectives told Gonsalves defendant was "a little slow." Gonsalves advised defendant of her *Miranda* warnings. Gonsalves said defendant was "just quiet at that point." Defendant did not respond verbally when she was asked if she understood her rights. Defendant nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings. Cameron was in the room, but did not say anything. Gonsalves testified that defendant was responsive to his questions during the interrogation, but he conceded that communicating with defendant was "difficult" and "slow." The record does not indicate whether Gonsalves' questions to defendant were suggestive or leading, or whether they called for a narrative response.

After hearing testimony in this matter, the circuit court rendered its ruling. The judge's initial statements indicate that he believed the issue in this case was the same as that presented in *People v. Bernasco,* 138 Ill.2d 349, 150 Ill.Dec. 155, 562 N.E.2d 958 (1990), cited by defendant. The court perceived the issue as "two fold": whether defendant's statements were obtained free of police coercion, misconduct, or overreaching; and whether "a valid *Miranda* waiver must be knowing and intelligent."

Citing *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the circuit court stated that a confession is not rendered involuntary under the federal due process clause without "some police overreaching." In the circuit court's view, there was no evidence suggesting

that the police had done anything to coerce the defendant to give a statement. The court ruled that defendant was not in custody until after she had confessed to Winstead; consequently, *Miranda* warnings were not required prior to that time, and any statements she made before that point were admissible. The circuit court determined that Winstead had "gratuitously offered" defendant *Miranda* warnings on the morning of her arrest, even though the warnings were not required by the attendant circumstances. The court said there was "no dispute" that defendant was mentally handicapped, but ruled "that goes to the weight of those statements, not to whether those statements were admissible."

The court concluded that defendant *was* in custody following her statement to Winstead and she did not knowingly and intelligently waive her *Miranda* rights. In so ruling, the court relied upon the uncontroverted testimony of Pan and Wertzel, and that of law enforcement personnel who observed defendant's actions and demeanor during periods of interrogation. The court specifically mentioned "the testimony of Winstead about how she acted and [Assistant] State's Attorney Gonsalves that she did not respond verbally [when] given her rights. She merely stood silent."

Based upon the uncontested testimony of the witnesses, the court suppressed the statement defendant made to Assistant State's Attorney Gonsalves following her arrest. The court, however, denied defendant's motion with respect to any statements made *before* defendant was in custody.

On appeal, the State posits a single issue: whether defendant's final "statement" or "confession" to Winstead –

which, on the basis of the trial court's ruling, the State assumes was noncustodial – was "constitutionally voluntary because it was given without police coercion" – a second assumption based upon conclusions the trial court drew from undisputed facts. Defendant continues to argue, *inter alia,* that defendant was in custody when she gave the allegedly inculpatory statement to Detective Winstead and that she did not effectively waive her *Miranda* rights. The State disputes the former contention, but not the latter.

We begin our analysis by identifying the relevant standard of review and the burden of proof. A court of review will accord great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence; however, the court will review *de novo* the ultimate question posed by the legal challenge to a trial court's ruling on a motion to suppress. *People v. Sorenson,* 196 Ill.2d 425, 431, 256 Ill.Dec. 836, 752 N.E.2d 1078 (2001); *People v. Schoening,* 333 Ill.App.3d 28, 31-32, 266 Ill.Dec. 681, 775 N.E.2d 243 (2002). Where a defendant challenges the admissibility of his confession through a motion to suppress, the State has the burden of proving the confession was voluntary by a preponderance of the evidence. 725 ILCS 5/114-11(d) (West 2000); *In re G.O.,* 191 Ill.2d 37, 49, 245 Ill.Dec. 269, 727 N.E.2d 1003 (2000). The concept of voluntariness includes proof that the defendant made a knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel. *People v. Reid,* 136 Ill.2d 27, 54, 143 Ill.Dec. 239, 554 N.E.2d 174 (1990); *People v. Joya,* 319 Ill.App.3d 370, 378, 253 Ill.Dec. 158, 744 N.E.2d 891 (2001).

In this case, the trial court determined that defendant was unable to effectively waive her *Miranda* rights, based upon the unrefuted testimony of the doctors who had examined her and law enforcement personnel who observed her actions and demeanor. Consequently, the trial court granted the defendant's motion to suppress as to statements allegedly made by defendant after she was formally arrested. The court denied defendant's motion with respect to her earlier statement to Winstead only because the court believed she was not "in custody" for purposes of *Miranda* at that time. Since defendant continues to argue that she *was* in custody when she was interrogated by Winstead at the police station on June 25, 1993, we first address the custodial issue.

The determination of whether a defendant is "in custody" for *Miranda* purposes involves "[t]wo discrete inquiries * * * : first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383, 394 (1995); *United States v. Badmus,* 325 F.3d 133, 138 (2d Cir.2003). See also *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317, 336 (1984) ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). Thus, in determining whether a person is "in custody" for purposes of *Miranda,* a court should first ascertain and examine the circumstances surrounding the interrogation, and then ask if, given those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *People v. Patel,* 313 Ill.App.3d 601, 604, 246 Ill.Dec.

557, 730 N.E.2d 582 (2000). With respect to the latter inquiry, the accepted test is what a reasonable person, innocent of any crime, would have thought had he or she been in the defendant's shoes. *People v. Fair,* 159 Ill.2d 51, 67, 201 Ill.Dec. 23, 636 N.E.2d 455 (1994), quoting *People v. Wipfler,* 68 Ill.2d 158, 166, 11 Ill.Dec. 262, 368 N.E.2d 870 (1977).

When examining the circumstances of interrogation, the following factors have been found relevant in determining whether a statement was made in a custodial setting: the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, and the age, intelligence, and mental makeup of the accused. See *People v. Lucas,* 132 Ill.2d 399, 417, 139 Ill.Dec. 447, 548 N.E.2d 1003 (1989); *People v. Fletcher,* 328 Ill.App.3d 1062, 1073, 263 Ill.Dec. 312, 768 N.E.2d 72 (2002); *People v. Armstrong,* 318 Ill.App.3d 607, 613, 252 Ill.Dec. 641, 743 N.E.2d 215 (2000); *Patel,* 313 Ill.App.3d at 604-05, 246 Ill.Dec. 557, 730 N.E.2d 582; *People v. Rivera,* 304 Ill.App.3d 124, 128, 237 Ill.Dec. 455, 709 N.E.2d 710 (1999); *People v. Savory,* 105 Ill.App.3d 1023, 1028, 61 Ill.Dec. 737, 435 N.E.2d 226 (1982). Although it is generally irrelevant that the interrogating officer subjectively viewed the individual under questioning as a suspect, the officer's beliefs, if conveyed by word or deed to the individual being questioned, *are* relevant to the extent that they would affect how a reasonable person in the position of the individual being questioned would have gauged the breadth of his freedom of action. *Stansbury v. California,* 511 U.S. 318, 324, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293,

299 (1994); *Patel,* 313 Ill.App.3d at 604, 246 Ill.Dec. 557, 730 N.E.2d 582.

As we consider the age, intelligence, and mental makeup of the accused in our examination of the circumstances surrounding the interrogation, so those factors are analytically intertwined with the reasonable-person prong of the custodial question. Indeed, other courts have incorporated these factors into the reasonable-person standard in varied circumstances involving investigatory interaction between the police and citizens. See *United States v. Zapata,* 997 F.2d 751, 759 (10th Cir.1993) (notwithstanding reasonable-person standard, attributes such as age, education and intelligence of the accused have been recognized as relevant in determining whether consent was voluntary); *United States v. Little,* 18 F.3d 1499, 1505 (10th Cir.1994) (in applying the reasonable-person standard to a consent to search issue, the "particular personal traits * * * of the defendant" may become relevant * * * if the police officer knows of the personal traits or characteristics and they influence his or her conduct); *Commonwealth v. Reid,* 571 Pa. 1, 28, 811 A.2d 530, 546 (2002) (when considering whether consent was voluntarily given, a "reviewing court should evaluate the characteristics of the accused, the interaction between the accused and the police, and assess how a reasonable person in the accused's shoes would have reacted to that interaction"); *United States v. Montgomery,* 14 F.3d 1189, 1194 (7th Cir.1994) (even when examining a noncustodial interrogation, a court should look to "the characteristics of the accused and the details of the interrogation" to determine whether a reasonable person would have felt coerced); *United States v. Cichon,* 48 F.3d 269, 276 (7th Cir.1995) (same); *United*

States v. Oliver, 142 F.Supp.2d 1047, 1051 (N.D.Ill.2001) (same).

The justification for incorporating individual characteristics of the subject-actor into the reasonable-person standard logically must apply in this situation as well. If, as is the case, we are concerned with what a reasonable person "in the defendant's shoes" (see *Lucas,* 132 Ill.2d at 418, 139 Ill.Dec. 447, 548 N.E.2d 1003) would have thought about his or her freedom of action, the reasonable person we envision must at least wear comparable footwear; otherwise, we ought to simply abandon the legal charade that the defendant's characteristics, perspective and perception matter at all.

Recognizing this principle, the Ninth Circuit Court of Appeals has suggested the applicable standard should indeed be modified in this context, where a juvenile is concerned, to reflect what a reasonable juvenile would have thought in defendant's position. *Alvarado v. Hickman,* 316 F.3d 841, 848 (9th Cir.2002). In its analysis, the *Alvarado* court first recited the now firmly established legal principle that "juvenile defendants are, in general, more susceptible to police coercion than adults; as such, due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation." *Alvarado,* 316 F.3d at 843. The *Alvarado* court then reasoned, "If a juvenile is more susceptible to police coercion during a custodial interrogation, then the same juvenile is also more susceptible to the impression that he is, in fact, in custody in the first instance." *Alvarado,* 316 F.3d at 843. Next, the court seemingly sanctioned a reasonable-juvenile standard to be applied to the determination of custodial interrogation. The *Alvarado* court quoted,

with special emphasis, from *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir.1998):

> "'Given these facts, *a reasonable juvenile* in E.L.'s position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest.'" (Emphasis in original.) *Alvarado,* 316 F.3d at 848, quoting *Erving L.,* 147 F.3d at 1248.

The *Alvarado* court then observed, "When we survey the landscape of state court decisions, we note that every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the 'in custody' determination, either as a factor in the totality of circumstances test, or by way of *modification to the reasonable person standard.*" (Emphasis added.) *Alvarado,* 316 F.3d at 850 n. 5 (collecting cases). See generally *State v. Jason L.,* 129 N.M. 119, 126, 2 P.3d 856, 863 (2000) (characteristics such as whether the person being questioned is a child or an adult are objective and relevant to the question of whether a reasonable person would feel free to terminate questioning and leave); *Ramirez v. State,* 739 So.2d 568, 574 (Fla.1999) (applying "reasonable juvenile" standard to determine whether defendant would have believed he was in custody at the time of the interrogation); *In re D.A.R.,* 73 S.W.3d 505, 511 (Tex.Ct.App.2002) ("We believe the facts here establish that a reasonable thirteen-year-old would have believed he was in custody"); *In re Loredo,* 125 Or.App. 390, 394, 865 P.2d 1312, 1315 (1993) (custodial question entailed inquiry into what a reasonable person of the child's age, knowledge and experience would have thought); *In re Robert H.,* 194 A.D.2d 790, 791, 599 N.Y.S.2d 621, 623 (1993) ("[A] reasonable 15-year-old, in the position of Robert, would not have believed he was free

to leave the scene"); *In re Rennette B.,* 281 A.D.2d 78, 85, 723 N.Y.S.2d 31, 37 (2001) (same). In this context, our own appellate court has modified the reasonable-person standard, where a juvenile is involved, considering what a reasonable juvenile would have thought about his or her custodial status. See *In re J.W.,* 274 Ill.App.3d 951, 960, 211 Ill.Dec. 55, 654 N.E.2d 517 (1995) ("Although J.W. had not been formally arrested * * * a reasonable 14-year-old person would have been entitled to believe * * * he was in police custody and not free to leave"). See also *People v. Armstrong,* 318 Ill.App.3d 607, 614-15, 252 Ill.Dec. 641, 743 N.E.2d 215 (2000).

The same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned. "[M]ental retardation may have a significant impact on an individual who finds himself involved with the criminal justice system, particularly in the context of confessions and interrogations. * * * Many mentally retarded people may be less likely to withstand police coercion or pressure due to their limited communication skills, their predisposition to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive." L. Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty,* 52 Ala. L.Rev. 911, 917 (2001). See also P. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions,* 81 Va. L.Rev. 1471, 1473 (1995) ("Mentally retarded persons are more susceptible to coercion, more likely to confess falsely, and less

likely to understand their rights than people of normal intellectual ability"). Just as they are more susceptible to police coercion during a custodial interrogation, the mentally retarded are also more susceptible to the impression that they are, in fact, in custody in the first instance. The circumstances of the instant case amply demonstrate the point.

Including the initial interrogation of June 25, 1993, defendant was questioned by police six times before she was formally arrested: four times at a police facility, once at her home and once at the scene of the crime. The police enlisted the aid and consent of Cameron – who apparently represented herself to be defendant's sister and legal guardian – in order to question defendant. Cameron acted as a translator of sorts and actually facilitated the police interrogation. Her role in the process of interrogation is not what we characterize as that of a family member concerned with defendant's welfare. It is not evident from the record that defendant ever verbally assented to police interrogation. On every occasion that she was questioned outside her home, the police transported defendant. Two detectives were always present during the interrogations. Although it is not clear from the record whether defendant was present when Winstead advised Cameron that defendant was a suspect, even a mentally retarded suspect might well have regarded herself as such after Winstead had expressed disbelief of her version of events and had asked her to take a polygraph examination. We also note that Winstead for the first time read defendant her *Miranda* rights on June 25, something he had not done in previous encounters. We have no doubt whatsoever that a reasonable person with defendant's mental capacity would

have believed he or she was in custody and not free to leave the police station.

In fact, our research has disclosed a case involving similar circumstances, a person of apparently *normal* intelligence, and a determination that the interrogation *was* custodial. In *United States v. Wauneka,* 770 F.2d 1434 (9th Cir.1985), defendant was questioned by law enforcement officials on four occasions, three on the day of his confession. On the first three, he was transported from his residence to a Bureau of Indian Affairs office by plain clothes agents. When he was picked up the last time for further questioning, Wauneka was transported by two armed officers and was placed in a large conference room with four or five officers who each had an opportunity to question him. The hour-long interrogation eventually turned accusatory. During a break, Wauneka, who was then 18 years old, broke down crying. FBI agents resumed the questioning despite the fact that Wauneka was visibly shaken by this ordeal and eventually obtained a confession. Wauneka had no means of transportation, and he was never offered an opportunity to leave the Bureau's office prior to his confession. On these facts, the court of appeals upheld a district court ruling that Wauneka was "in custody" for purposes of *Miranda* when he confessed. The court stated, "A reasonable innocent person in such circumstances probably would have concluded that he was not free to leave." *United States v. Wauneka,* 770 F.2d 1434, 1438-39 (9th Cir.1985).

Like Wauneka, the defendant in this case was repeatedly taken by officers to a law enforcement facility and questioned. As in *Wauneka,* the instant defendant was never told she could leave the station when she wished; she was taken home by the police when they were finished

with her. By the time of the encounter on June 25, the atmosphere of the interrogation had turned accusatory: defendant had taken a polygraph examination and had been designated a suspect by Winstead. However, defendant, unlike *Wauneka,* is mentally retarded. She was only at the police station because her purported guardian/sister agreed to police requests that she accompany them there. Her options, no doubt, seemed very limited indeed. Under the circumstances, a reasonable person with defendant's mental capacity would not have felt free to leave. We conclude that the circuit court erred in ruling defendant was not in custody when she allegedly gave an inculpatory statement to Detective Winstead on June 25, 1993.

Having determined that Winstead's interrogation of defendant on June 25 was custodial, we now address the question of whether defendant knowingly and intelligently waived her *Miranda* rights. Custodial interrogation is, of course, inherently coercive and "'trades on the weakness of individuals.'" *Dickerson v. United States,* 530 U.S. 428, 435, 120 S.Ct. 2326, 2331, 147 L.Ed.2d 405, 414 (2000), quoting *Miranda v. Arizona,* 384 U.S. 436, 455, 86 S.Ct. 1602, 1618, 16 L.Ed.2d 694, 712 (1966). As we have noted previously herein, it is generally recognized that the mentally retarded are considered more susceptible to police coercion or pressure than people of normal intellectual ability, they are predisposed to answer questions so as to please the questioner rather than to answer accurately, they are more likely to confess to crimes they did not commit, they tend to be submissive, and they are less likely to understand their rights. See M. McCloud, *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects,* 69 U. Chi. L.Rev. 495, 503, 538 (2002); L. Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty,* 52 Ala. L.Rev. 911, 917 (2001). P. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions,* 81 Va. L.Rev. 1471, 1473 (1995).

However, evidence of a defendant's limited mental or intellectual capacity at the time of a confession, alone, does not establish that he or she was incapable of waiving *Miranda* rights. Limited intellectual capacity is one of several factors to be considered in this regard. *People v. Foster,* 168 Ill.2d 465, 476, 214 Ill.Dec. 244, 660 N.E.2d 951 (1995); *People v. Mahaffey,* 165 Ill.2d 445, 462, 209 Ill.Dec. 246, 651 N.E.2d 174 (1995).

Nevertheless, "[w]aiver of a constitutional right is valid only if it is clearly established that there was 'an intentional relinquishment or abandonment of a known right * * * .'" *People v. Johnson,* 75 Ill.2d 180, 187, 25 Ill.Dec. 812, 387 N.E.2d 688 (1979), quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). See *People v. McClanahan,* 191 Ill.2d 127, 137, 246 Ill.Dec. 97, 729 N.E.2d 470 (2000). Waivers must not only be voluntary, but must be knowing and intelligent acts in the sense that they are done with sufficient awareness of the relevant circumstances and likely consequences. *McClanahan,* 191 Ill.2d at 137, 246 Ill.Dec. 97, 729 N.E.2d 470; *Bernasco,* 138 Ill.2d at 364-65, 150 Ill.Dec. 155, 562 N.E.2d 958.

A valid waiver of *Miranda* rights must be knowingly and intelligently made. *Bernasco,* 138 Ill.2d at 364-65, 150 Ill.Dec. 155, 562 N.E.2d 958. A criminal suspect is not required to know and understand every possible consequence of a waiver of the Fifth Amendment privilege for it

to be knowingly and intelligently made. *Colorado v. Spring,* 479 U.S. 564, 574, 107 S.Ct. 851, 857, 93 L.Ed.2d 954, 966 (1987). However, in order to effect an intelligent and knowing waiver of *Miranda* rights, a defendant must have "'"a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."'" *Bernasco,* 138 Ill.2d at 360, 150 Ill.Dec. 155, 562 N.E.2d 958, quoting *Patterson v. Illinois,* 487 U.S. 285, 292, 108 S.Ct. 2389, 2395, 101 L.Ed.2d 261, 272 (1988). The defendant need not understand far-reaching legal and strategic effects of waiving his or her rights or appreciate how widely or deeply an interrogation may probe; however, the defendant must at least understand basically what those rights encompass and minimally what their waiver will entail. *Mahaffey,* 165 Ill.2d at 462, 209 Ill.Dec. 246, 651 N.E.2d 174, quoting *Bernasco,* 138 Ill.2d at 363, 150 Ill.Dec. 155, 562 N.E.2d 958. Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466; *In re J.J.C.,* 294 Ill.App.3d 227, 233, 228 Ill.Dec. 751, 689 N.E.2d 1172 (1998).

It is all too obvious, as the trial court concluded, that the defendant in this case did not knowingly and intelligently waive her *Miranda* rights. The State does not even attempt to argue that point. Winstead advised defendant of her *Miranda* warnings from a standard form without additional explanation. Defendant made no verbal response; she merely nodded her head in an affirmative manner. Winstead later recalled that Cameron told defendant something to the effect of: "He's telling you that you don't have to talk to me and that you're not going to be in

trouble or something." Defendant nodded her head in agreement and "seemed to understand what her sister was saying." Defendant never verbally indicated that she understood, and she did not sign a waiver form. Indeed, it is unclear to what extent defendant ever responded to, or communicated with, Winstead. He acknowledged that Cameron "initially" acted as an "interpreter," and it is obvious from his testimony that she was still acting in that capacity on June 25, 1993, despite Winstead's suggestion to the contrary: "After a while, after I talked to [defendant] somewhat, I could begin to understand or she'd answer me or she wouldn't." That statement is hardly a testament to an acceptable level of communication and understanding between Winstead and defendant. The record does not indicate whether Winstead's questions to defendant were suggestive or leading, or whether they called for a narrative response.

Assistant State's Attorney Gonsalves testified that he advised defendant of her *Miranda* warnings, and she was "just quiet at that point." Defendant did not respond verbally when she was asked if she understood her rights. Defendant simply nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings. Cameron was in the room, but did not say anything. Gonsalves testified that defendant was responsive to his questions during the interrogation, but he conceded that communicating with defendant was "difficult" and "slow." The record does not indicate whether Gonsalves' questions to defendant were suggestive or leading, or whether they called for a narrative response. It does not appear from the record that defendant had any prior experience with the criminal justice system.

Dr. Philip Pan characterized defendant's mental impairment as moderate mental retardation. He determined her condition was profound to a degree that she was unfit to stand trial. He noted that four other psychiatrists had reached the same conclusion. Pan rendered his opinion that defendant was incapable of understanding *Miranda* warnings. He noted that her thinking was "idiosyncratic," meaning she was often "not on the same page" as the person questioning her. She would frequently answer questions in a completely irrelevant manner.

Dr. Linda Wertzel, a clinical psychologist, examined defendant in 1994 and testified to her findings. Wertzel concluded that defendant was mentally retarded with an IQ of 54. Wertzel stated that defendant could provide only "simple answers to direct questions and really did not provide a narrative of information." Defendant functioned, mathematically, at a kindergarten level. Defendant was unsure if she had ever gone to school. She could not read or write. Wertzel determined that defendant could only express herself at a "very simple childish level" and she could not comprehend more than a one-step command. Defendant's comprehension of her circumstances was marginal, and she was unable to understand her *Miranda* rights.

Wertzel examined defendant again in October of 1999 and concluded defendant remained unable to understand her *Miranda* warnings. Wertzel then administered the Peabody Picture Vocabulary Test to defendant. Defendant scored the age equivalent of a five-year-old. After her 1999 examination of defendant, Wertzel determined it was "highly unlikely" that defendant ever had the ability to comprehend or waive *Miranda* rights. Wertzel described defendant as "sort of like a child, * * * unsure of what is

real and what is imagined, what is an actual memory, what is told to them." Moreover, she stated that defendant does not tolerate stress very well and is "suggestible." Wertzel described more than one instance where she was able to lead defendant in the questioning to get the response desired.

The uncontroverted testimony in this case demonstrates that defendant did not knowingly and intelligently waive her *Miranda* rights. No other conclusion is possible based on the evidence adduced at the suppression hearing. Defendant was subjected to repeated interrogation that was actually *facilitated* by her purported sister/guardian. By repeatedly taking defendant where they wanted, when they wanted, the police reinforced their authority and control over her. Defendant apparently had no prior experience with the criminal justice system. She was clearly a suspect by the time she took a polygraph test and was thereafter questioned on June 25, 1993. The experts who testified were unanimously of the opinion that defendant was incapable of understanding and waiving her *Miranda* rights. Aside from the State's testimony regarding defendant's ambiguous nods, there was no evidence even suggesting that defendant waived her rights. In fact, the minimal level of communication between law enforcement officials and the defendant throughout the investigation of this case is a matter of great concern to this court and should have been to the officers involved, who proceeded to repeatedly question defendant despite her obvious impairment and vulnerability. We note that the degree of defendant's mental impairment is comparable to that of the defendants in *Bernasco* and *People v. Robinson,* 301 Ill.App.3d 634, 235 Ill.Dec. 395, 704 N.E.2d 968 (1998). In both cases, confessions were suppressed. *Bernasco,* 138

Ill.2d at 350-51, 150 Ill.Dec. 155, 562 N.E.2d 958; *Robinson,* 301 Ill.App.3d at 643, 235 Ill.Dec. 395, 704 N.E.2d 968.

It has been said that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v. Illinois,* 378 U.S. 478, 488-89, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977, 985 (1964). Custodial interrogation trades on the weakness of individuals (*Dickerson,* 530 U.S. at 435, 120 S.Ct. at 2331, 147 L.Ed.2d at 414, quoting *Miranda,* 384 U.S. at 455, 86 S.Ct. at 1618, 16 L.Ed.2d at 712); the young and mentally infirm are most vulnerable. The potential for abuse is obvious, as is the need for adequate safeguards. We believe this case amply demonstrates the point.

Both confessions defendant allegedly gave on June 25, 1993, were made under circumstances custodial in nature. As defendant was incapable of knowingly and intelligently waiving her *Miranda* rights, both statements should have been suppressed. We express no opinion regarding the admissibility of statements defendant may have made prior to that date. The State's argument on appeal concerns only defendant's "confession to the detectives." We, therefore, affirm the judgment of the appellate court insofar as we reverse and remand for further suppression proceedings and a new discharge hearing. We modify the appellate court's judgment to the extent that we limit the scope of any further suppression proceedings to statements defendant may have made prior to June 25, 1993.

Given our disposition, we need not reach the issue upon which the appellate court disposed of this case. We may affirm the result below on any basis that is supported by the record. *People v. Huff,* 195 Ill.2d 87, 91, 253 Ill.Dec. 108, 744 N.E.2d 841 (2001); *In re Application of the Cook County Treasurer,* 185 Ill.2d 428, 436, 235 Ill.Dec. 910, 706 N.E.2d 465 (1998).

For the reasons stated, we affirm the judgment of the appellate court as modified and remand to the circuit court for further proceedings consistent with this opinion.

Affirmed as modified; cause remanded.

Supreme Court, U.S.
FILED
JAN 2 2 2004
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No. 02-1684

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1684

MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner*,

v.

MICHAEL ALVARADO, *Respondent*.

Under 28 U.S.C. § 2254(d), habeas corpus relief was permitted in this case only if the state court's adjudication of respondent Michael Alvarado's claim was "contrary to" or an "unreasonable application of" the constitutional law "clearly established" by the holdings of this Court's precedents. The Ninth Circuit, however, nullified Alvarado's state criminal judgment because the California Court of Appeal had failed to "extend" the holdings of this Court's *Miranda*[1] precedents in a way that, the Ninth Circuit acknowledged, this Court had never done.

Alvarado's merits brief, perhaps recognizing the difficulty of defending the Ninth Circuit's interpretation of § 2254(d) to allow federal habeas corpus review of state-court failures to alter Supreme Court precedent by "extending" it, emphasizes instead that the result below was right for other reasons. In Alvarado's view, this Court's precedents clearly establish that a court must consider the effect of a subject's age and experience on his perception in determining whether he is in "custody" for *Miranda* purposes. His defense of the Ninth

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Circuit opinion on this ground, however, evaporates in light of this Court's many *Miranda* precedents over four decades, none of which has ever stated, let alone held, that such subjective factors must be considered as well as the objective, external indicia of custody. Nor do Alvarado or his supporting amicus briefs offer any workable standard as to how a police officer should assess the effect of a suspect's "juvenile status" in determining "custody." *See* pages 14-17, post.

The *amicus curiae* brief of the National Association of Criminal Defense Lawyers (NACDL Amicus Br.) proclaims that, if the State's challenge to the Ninth Circuit's interpretation of § 2254(d) succeeds, it will be the end of federal habeas corpus review for state prisoners. NACDL Amicus Br. 11. In presenting this argument, amicus NACDL concentrates its attack on a straw man rather than on the argument actually presented in the opening brief of petitioner Michael Yarborough (Warden). In any event, amicus NACDL's analysis of the statute cannot be reconciled with § 2254(d)'s language or the fundamental habeas corpus reform it was intended to bring about.

I.

SECTION 2254(d) DOES NOT ALLOW HABEAS RELIEF BASED ON THE LOWER FEDERAL COURT'S CONCLUSION THAT THE STATE COURT FAILED TO EXTEND THIS COURT'S HOLDINGS TO A NEW CONTEXT

A. Applying "Clearly Established Federal Law, As Determined By The Supreme Court" Does Not Include Extending This Court's Precedents To A New Context

1. In contrast with the arguments pressed by Alvarado and amicus NACDL, the Warden's position lies at the point where Congress struck the policy balance in restricting habeas corpus review of state criminal judgments by the lower federal

courts. As the Warden has argued, the essential provisions of § 2254(d)'s deferential standard of review combine to rule out any notion that the federal court might grant relief by extrapolating from this Court's precedents an "extended" rule of law that this Court itself has never adopted. *See* Pet'r Br. 10-24. Such an "extension" by the lower federal court changes the original rule as set out in this Court's holdings, and therefore cannot already have been "clearly established," by this Court, at the time of the earlier state-court adjudication of the prisoner's claims. *See* Pet'r Br. 15-16.

Nor do § 2254(d)'s exceptions admit of any such authority to invoke "extensions" of law retroactively in habeas corpus cases. The statutory exception for state-court misinterpretations of the law that are "contrary to" this Court's holdings provides no such grant of authority. It cannot be said that a state court has contradicted a pronouncement of a constitutional rule of law by this Court if this Court has never pronounced it, even though a circuit court of appeals might seek to pronounce it instead. The "unreasonable application of * * * law" provision of § 2254(d) does not support any such power either. It is implausible to conclude that Congress—having limited the exception for misinterpretations of law to those so "diametrically different" as to be "contrary to" this Court's clear precedent—would in the very next words of the statute undermine that policy under the rubric of an exception for unreasonable "applications" of that law to the individual facts of a given case. A true "application" of the law to the facts is very different from "extending" or otherwise altering the rule of law itself in the process.

2. Alvarado and amicus NACDL are mistaken in suggesting that the Warden considers "clearly established Federal law, as determined by the Supreme Court," to be the result of "perfunctorily applying holdings in previous cases to virtually identical fact patterns" (Resp. Br. 41) or only specific bright-line rules (NACDL Amicus Br. 9-11). The Warden has never argued that § 2254(d)'s restriction on habeas corpus

invariably prevents relief where "clearly established Federal law, as determined by the Supreme Court" is applied to fact patterns different from those that gave rise to this Court's articulation of the law in its relevant precedents.

Amicus NACDL also argues that rules that address a wide range of fact patterns necessarily apply to novel contexts. NACDL Amicus Br. 11. Alvarado and amicus NACDL do not recognize that this Court's rules vary in their nature as to the factual contexts that they are intended to address. Some are very specific themselves; others are general and designed to evaluate myriad disparate facts that might give rise to a specific claim. *See* Pet'r Br. 20-21. Straightforward applications of rules of general application will not result in "extensions to novel contexts" merely on account of the variations in the facts and evidence of each new case. *Cf. Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring).

Nevertheless, under the guise of reviewing the reasonableness of a state court's application of a rule of general application, a federal habeas court might end up improperly adopting an extension of Supreme Court precedent to a novel setting. As ably demonstrated in the Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner (CJLF Amicus Br. 21), *Bell v. Cone*, 535 U.S. 685, 693 (2002), serves as an illustration. Under the "unreasonable application" rubric, the Sixth Circuit improperly changed the *Strickland* rule by engrafting on it a sub-rule condemning waiver of final argument as per se incompetence. *See Strickland v. Washington*, 466 U.S. 668 (1984). The Sixth Circuit also subtly changed the *Cronic* rule so that its presumption of prejudice would apply to any discrete act by counsel in failing to challenge the prosecution's case at a given point of the trial rather than to failures so pervasive with respect to the entire trial that they rose to a level to justify imposition of the presumption without any showing of affect on the result. *See United States v. Cronic*, 466 U.S. 648 (1984). Under the cover of reviewing for

"unreasonable application," it had changed the rules from those that this Court had clearly established.

Likewise, a federal court would err under § 2254(d) if, in the course of a reviewing a state court's application of the *Jackson v. Virginia* rule for testing the sufficiency of evidence to support a criminal conviction, it extended or otherwise changed the rule of review itself so as to disqualify certain evidence from consideration or to compel a somewhat different analysis for different crimes. *See* CJLF Amicus Br. 21; *Jackson v. Virginia*, 443 U.S. 307 (1979).

3. Similarly, for the phrase "clearly established Federal law, as determined by the Supreme Court" to have any meaning, a federal habeas court must not overly-generalize this Court's holdings. This Court's holdings must be defined at the appropriate level of specificity before a court can determine if it was clearly established. *Taylor v. Withrow*, 288 F.3d 846, 855 (CA6) (Boggs, J., dissenting), *cert. denied*, 537 U.S. 1007 (2002); *cf. Wilson v. Layne*, 526 U.S. 603, 615 (1999) (a constitutional right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was "clearly established law" in qualified immunity cases for 42 U.S.C. § 1983 claims); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (stating "[I]f the test of 'clearly established law' were to be applied at this level of generality * * * * [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.").

Falling into this trap in this case, the Ninth Circuit determined that "the relevant legal principle here, amply supported by Supreme Court precedent, is that juvenile defendants are accorded heightened procedural safeguards commensurate with their age and experience." Pet. App. A23. Amicus NACDL, also, states that the clearly established federal law is "due process jurisprudence." NACDL Amicus Br. 25. Interpreting "clearly established law" at such a high level of

generality, however, would render the central role of § 2254(d) in restricting federal-court review a nullity.

B. This Court Should Resolve Whether § 2254(d) Allows Any Exceptions For Instances In Which The State Court Refrains From "Extending" This Court's Holdings To A Novel Context

1. Alvarado argues that this Court in *Ramdass v. Angelone*, 530 U.S. 156 (2000), "adopted the extension test as part of its settled § 2254(d)(1) unreasonable application law." Resp. Br. 42; *see* NACDL Amicus Br. 6-9 (asserting *Ramdass* answered the question left open by *Williams v. Taylor*, 529 U.S. 362, 408-09 (2000)). *Ramdass,* however, did not resolve the issue, which this Court had declined to address in *Williams.*

In *Williams*, this Court stated:

> The Fourth Circuit also held in *Green* [*v. French*, 143 F.3d 865 (CA4 1998)] that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. See 143 F. 3d, at 869-70. Although that holding may perhaps be correct, the classification does have some problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context.

Williams, 529 U.S. at 408. This Court then concluded that, "[t]oday's case does not require us to decide how such

'extension of legal principle' cases should be treated under § 2254(d)(1)." *Id.* at 408-09.

After *Williams,* the plurality opinion in *Ramdass* described § 2254(d)'s standard of review "as explained in Justice O'Connor's opinion for the Court in *Williams v. Taylor*, 529 U.S. 362, 412-413." *Ramdass,* 530 U.S. at 166. This description apparently served as a mere recapitulation of *Williams* rather than an unexplained resolution of the issue *Williams* explicitly had left open. In any event, the Court's reference to "extension" in its description of § 2254(d)'s standard of review played no role in the *Ramdass* decision, for the Court did not ultimately conclude that the state court had unreasonably refused to extend the governing legal principle. Nor did the *Ramdass* plurality discuss the "problems of precision" alluded to in *Williams*, or give guidance as to how to identify a state court decision that involves an unreasonable application of a legal principle to a new decision. The *Ramdass* plurality simply did not resolve whether § 2254(d)'s unreasonable application prong includes an unreasonable extension of a legal principle to a new context.

2. Alvarado mistakenly asserts that "all of the federal courts of appeal have referenced, even if in some instances they have not formally adopted, the 'extension' prong of the 'unreasonable application' clause of § 2254(d)(1)." Resp. Br. 42-43 & n.40; *see* NACDL Amicus Br. 8 (stating "eleven federal court of appeals have agreed with the *Ramdass* plurality"). Other than the Ninth Circuit, only two courts of appeal have actually held that extending or refusing to extend Supreme Court precedent can constitute an unreasonable application of federal law. *See Kennaugh v. Miller*, 289 F.3d 36, 45 (CA2), *cert. denied*, 537 U.S. 909 (2002); *Taylor*, 288 F.3d at 852-53; *but see Hawkins v. Alabama*, 318 F.3d 1302, 1306-07 n.3 (CA11 2003) (stating that the question of when a state court's refusal to extend a legal principle would constitute, under AEDPA, an unreasonable application of federal law is

unsettled and criticizing the Ninth Circuit's decision in the instant case).

Without addressing how extension of legal principle cases should be treated under § 2254(d), a majority of the circuits merely refer to *Williams*' extension language. But, as explained above, *Williams* did not resolve the question of how "extension of legal principle cases" should be treated under § 2254(d). 529 U.S. at 408-09. Accordingly, the references to extension of legal principle cases by these courts do little to help resolve this issue.

C. The *Teague* Doctrine Supports The Theory That An Extension Of Supreme Court Precedent To A New Context Is Not Clearly Established Federal Law As Determined By The Supreme Court

1. Alvarado argues that even in the *Teague* new rule context, this Court has recognized that an improper "new" rule differs from a proper extension or application of a recognized old one. Resp. Br. 40; *see* NACDL Amicus Br. 14-15; *Teague v. Lane*, 489 U.S. 288 (1989). Alvarado's and amicus NACDL's understanding of the *Teague* cases they cite is incorrect.

This Court stated in *Stringer v. Black*, 503 U.S. 222 (1992): "If * * * the [cited prior decision] did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Id.* at 228 (citing *Butler v. McKellar*, 494 U.S. 407, 414-15 (1990)). This statement reflects this Court's teaching in previous *Teague* cases about extensions of old rules in novel settings as new rules. This Court asked and answered the pertinent question in *Saffle v. Parks*, 494 U.S. 484, 488 (1990): "As we recognized in *Butler* * * *, the question [of whether we announce a new rule when a decision extends the reasoning of our prior cases]

must be answered by reference to the underlying purposes of the habeas writ." This Court stated:

> Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," [*Saffle*, 494 U.S. at 488], we have held that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts." [*Butler*, 494 U.S. at 414]. This principle adheres even if those good-faith interpretations "are shown to be contrary to later decisions." [*Saffle*, 494 U.S. at 488].

Graham v. Collins, 506 U.S. 461, 467 (1993).

2. Amicus NACDL argues that *Stringer* itself extended the holding of *Godfrey v. Georgia*, 446 U.S. 420 (1980), to a novel context. NACDL Amicus Br. 14-15. That is not so. The clearly established rule applicable in *Stringer* was the proscription against considering vague aggravating factors in determining a sentence of death. The *Stringer* Court simply determined, contrary to the State of Mississippi's argument, that the Mississippi death-penalty scheme in fact involved consideration of the pertinent aggravating factor in sentencing. 503 U.S. at 233-36. A rule is not extended to a new context when a court simply finds that the context in fact is the very one the rule explicitly governs.

Stringer, indeed, serves to refute amicus NACDL's argument that *Teague* allows extensions of precedent into novel contexts. In mandating the inquiry, *Stringer* apparently recognizes that a "new rule" is created where "the prior decision is applied in a novel setting, thereby extending the precedent." *Id.* at 228; *see O'Dell v. Netherland*, 521 U.S. 151, 162 (1997) (holding that a "step" would constitute a new rule); Pet'r Br. 14-15. Even if this Court had left open the theoretical possibility that an extension of a rule to novel context might not result in an impermissible "new" rule, this Court has never

recognized an extension of an old rule in a novel setting to be anything but a new rule.

Finally, beyond *Teague*, § 2254(d)(1) limits the authority of the federal habeas courts further. The touchstone of "clearly established" law is comprised of only the holdings of this Court rather than the interpretative jurisprudence of other state or lower federal courts. *Williams*, 529 U.S. at 412. "Extensions" are not contemplated by the § 2254(d) exceptions.

D. The California Court Of Appeal's Adjudication Was Neither Contrary To Nor An Unreasonable Application Of Clearly Established Supreme Court Precedent

Alvarado contends that this Court need not decide how "extension of legal principle" cases should be treated under § 2254(d) because the California Court of Appeal failed to identify what the law is and to reasonably apply the established law to the relevant facts. Resp. Br. 39. But the Ninth Circuit, even in granting relief, recognized that the state court had identified the correct legal standard for making an "in custody" determination. Pet. App. A7. The Ninth Circuit also acknowledged that no Supreme Court case has addressed whether a juvenile's age and experience need to be considered for a "custody" determination. Pet. App. A6, A22. The court then expressly rested its grant of habeas relief on the theory that a state court's decision can involve an "unreasonable application" of federal law if it extends, or fails to extend, a clearly established legal principle to a new context in a way that is objectively unreasonable. Pet. App. A23-A24 (stating that "[o]ur analysis involves the extension of the principle that juvenile status is relevant to the conduct of a custodial interrogation to the further determination whether a defendant is, in fact, 'in custody.'"); *see* Pet. App. A7 (stating "on the facts of this case, proper consideration of [juvenile status] compels a different outcome even under the highly deferential standard of review mandated by the AEDPA."). The issue of how

"extension of legal principle cases" should be treated under § 2254(d)—one of the two issues on which this Court granted certiorari—is properly before this Court.

Alvarado contends that the state court failed to consider the totality of the circumstances identified in this Court's prior decisions. Resp. Br. 32-35. He and the amici who support him frequently refer to alleged circumstances that, it turns out, are unsupported by evidence and that were mentioned only in his attorney's arguments during the motion hearing, specifically: that he asked, "Can't somebody come in with me or be here with me?"; that his parents asked and were denied permission to join the interview; and that an officer stated, "What do we have here; we are going to question a suspect." *See, e.g.*, Resp. Br. 2, 18, 20, 34; NACDL Amicus Br. 2; Brief of Juvenile Law Center, et al. as *Amici Curiae* in Support of Respondent (JLC Amicus Br.) 11, 22. As the Warden has explained, these kinds of circumstances are irrelevant to the ultimate inquiry of whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest, because they are largely subjective. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983); Pet'r Br. 29-36. Moreover, in support of these allegations, Alvarado cites only his attorney's arguments at the motion hearing and his own habeas petition allegations. *See, e.g.*, Resp. Br. 2 (citing J.A. 49 [habeas petition] and 185-86 [defense attorney's argument at motion hearing].) Alvarado, in fact, never introduced any evidence of these alleged circumstances. J.A. 167-97.

In a similar vein, Alvarado argues that it is untenable to say that his interview was not police-dominated because he was alone in an interrogation room in a police station with an armed homicide detective. Resp. Br. 18 & n.10. But there was no evidence in the record that Detective Comstock was armed or that any weapon was displayed during the interview. *See* J.A. 72-165, 331-39, 350-54, 437-39.

Alvarado's argument, that the California Court of Appeal's opinion demonstrates that the court did not consider the

remaining circumstances, *see* Pet. App. C12-C17, resembles the argument this Court rejected in *Early v. Packer*, 537 U.S. 3, 123 S. Ct. 362 (2002). In *Early*, the Ninth Circuit charged that the state court had failed to apply the totality of the circumstances test of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), because the state court "simply mentioned" three particular incidents in its analysis, failed to consider other critical facts, and failed to consider the cumulative impact of all the significant facts. *Early*, 123 S. Ct. at 365. Rejecting such criticism, this Court noted that the state court's opinion set forth many facts and circumstances beyond the three incidents, including two critical facts that the Ninth Circuit said it failed to consider. This Court stated:

> The contention that the California court "failed to consider" facts and circumstances that it had taken the trouble to recite strains credulity. The Ninth Circuit may be of the view that the Court of Appeal did not give certain facts and circumstances adequate weight (and hence adequate discussion); but to say that it did not *consider* them is an exaggeration.

Id. (emphasis in original).

Likewise, the California Court of Appeal described the circumstances of the interview. Pet. App. C12-C17. The court's opinion, not illogically, focused on Alvarado's main contention—that the case was controlled by *People v. Aguilera*, 51 Cal. App. 4th 1151, 59 Cal. Rptr. 2d 587 (1996), which the state court found distinguishable from Alvarado's case. Pet. App. C15-C17. Alvarado might disagree with the weight given to the facts; but it is inaccurate to state that the California Court of Appeal did not consider them. *See Early*, 123 S. Ct. at 365.

As explained in the Warden's opening brief, the California Court of Appeal was not required to consider Alvarado's age and experience. Pet'r Br. 29-39. Alvarado argues, based on what he calls the "uniformity of state court decisions,"[2/]

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2. The Ninth Circuit noted that eleven state court decisions, mostly

decisions of this Court in similar contexts, and the "generally understood meaning of reasonable person," that it was objectively unreasonable for the state court to not have considered his juvenile status. Resp. Br. 38. Under § 2254(d)(1), however, the California Court of Appeal was required only to reasonably apply clearly established federal law, as determined by this Court. The California Court of Appeal was not bound to follow decisions of other state courts or decisions from other legal contexts that could be, at best, dicta for a "custody" determination.

II.

A JUVENILE'S AGE AND EXPERIENCE ARE IRRELEVANT FOR DETERMINING "CUSTODY" FOR *MIRANDA* PURPOSES

A. *Miranda* Requires Warnings Only When The Individual Is Under Formal Arrest Or Restrained To The Degree Associated With A Formal Arrest

1. The *Miranda* Court made it clear that warnings are required only when there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Miranda*, 384 U.S. at 444. Alvarado argues that juvenile status is relevant to determining whether a juvenile is in custody because "juveniles are never at complete liberty to go about their business and, when not in the custody of their parents, are always in someone else's temporary custody." Resp. Br. 20; *see also* JLC Amicus Br. 7. He contends that "the state court

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intermediate courts, have ruled that juvenile status is relevant to the "in custody" determination. Pet. App. A19-A20 n.5. Alvarado adds two states to the Ninth Circuit's list. Resp. Br. 26-27 n.26. Amicus NACDL asserts that "not less than twenty-four jurisdictions" consider age of a suspect in determining custodial status, yet cites to court decisions from only five states. NACDL Amicus Br. 29.

completely ignored that [Detective] Comstock directly involved Michael's parents in the *transfer of custody* of Michael *from his parents* to the police at the station house." Resp. Br. 20 (emphasis added); *see also* Resp. Br. 27 n.27 (citing to California Family Code and California Welfare and Institutions Code regarding parental custody).

Alvarado conflates two legal terms with fundamentally different meanings—"custody" as used in family law context and "custody" for *Miranda* purposes. In the family law context; for example, "joint legal custody" means that both parents share the right and responsibility to make the decisions relating to the health, education, and welfare of a child. Cal. Fam. Code § 3003; *see also* Cal. Fam. Code § 3004 (definition of "joint physical custody"). This type of custody is nothing like formal arrest or its equivalent as "custody" is defined by *Miranda.* Alvarado is surely not arguing that parents have their children under formal arrest or that parents are agents of law enforcement. The logical conclusion of Alvarado's argument is that all juveniles need to be advised of their *Miranda* rights, not only by law enforcement officers, but also by their parents, school officials, and other temporary guardians.

2. Alvarado and the amici who support him urge that the *Miranda* "custody" determination should be modified for juveniles because "age matters" in other areas of law. Resp. Br. 23-25; NACDL Amicus Br. 22-23 & n.6; JLC Amicus Br. 4-11 (arguing that age matters for voluntariness of confessions, Fourth Amendment seizure analysis, school settings, random drug testing of student athletes, abortion rights, civil commitment, and sale of obscene material). Upon closer scrutiny, this broad argument is unpersuasive because while age may matter in some other legal contexts, Alvarado and his amici fail to explain how age and experience have any bearing on whether a person is in custody.

For example, Alvarado argues that this Court has recognized in the Fourth Amendment seizure analysis that the juvenile status should be taken into account. Resp. Br. 24

(citing *Kaupp v. Texas*, 583 U.S. 626, 123 S. Ct. 1843 (2003)). While the decision in *Kaupp* mentions that the defendant was seventeen years old, it is unclear whether the Court found the age to have been probative for Fourth Amendment seizure analysis. The *Kaupp* Court found evidence of every one of the probative circumstances mentioned by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), which do not include age and experience. *See Kaupp*, 123 S. Ct. at 1846.

In any event, a seizure under the Fourth Amendment is not necessarily custody for *Miranda* purposes. A seizure of a person within the meaning of the Fourth Amendment occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Kaupp*, 123 S. Ct. at 1845. At first blush, this analysis appears similar to the "in custody" inquiry set forth in *Thompson v. Keohane*, 516 U.S. 99, 112 (1995): "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." These two inquiries, however, are not interchangeable. *But see, e.g.*, NACDL Amicus Br. 27-28 (replacing references in quotations to the Fourth Amendment with the Fifth Amendment). In contrast to the seizure analysis for the Fourth Amendment, the "ultimate inquiry" for determining "custody" asks "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Thompson*, 516 U.S. at 112. This ultimate inquiry distinguishes *Miranda*'s custody determination from the seizure analysis under the Fourth Amendment. *See Berkemer v. McCarty*, 468 U.S. 420, 438-40 (1984) (noting that typical traffic stops and stops pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968) are seizures under the Fourth Amendment, but are not like formal arrests and do not require warnings under *Miranda)*; *see* Resp. Br. 24-25 (conceding that this Court has recognized that circumstances that constitute seizure under the Fourth Amendment do not necessarily constitute custody for *Miranda*

purposes). The contrast between seizure and formal arrest illustrates that age and experience are irrelevant for a custody determination under *Miranda*.

B. Age And Experience Are Not Relevant Considerations In Determining Whether A Juvenile Is "In Custody"

Alvarado asserts that age and experience "go directly to the 'in custody' determination." Resp. Br. 16. He and amici NACDL and JLC, however, do not explain how age and experience are relevant to whether a person is under formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The modification of the "in custody" determination for juveniles proposed by Alvarado would be a major shift in *Miranda* jurisprudence.

Alvarado argues that "restraint can be psychological as well as physical." Resp. Br. 8, 14-15 n.7. He reasons that limiting custody inquiry to "physical" indicia of arrest would be contrary to this Court's concerns. Resp. Br. 14-15 n.7. His argument is fundamentally at odds with the very definition of "custody" which is "formal arrest or otherwise deprived of his *freedom of action* in any significant way." *See Miranda*, 384 U.S. at 444 (emphasis added). Furthermore, this Court has held that psychological restraint is not "custody." In *Beckwith v. United States*, 425 U.S. 341, 345 (1976), the defendant argued that being the focus of the investigation placed him under psychological restraints that were equivalent of custody. This Court did not consider the subjective psychological restraint to be an indicia of arrest, and stated that the defendant "hardly found himself in the custodial situation described by the Miranda Court as the basis for its holding." *Id.* at 347.

Alvarado argues that, under the totality of the circumstances, a reasonable person in his position would not have felt free to terminate the interrogation and leave. Resp. Br. 32-35. But under his interpretation, a "reasonable person in his position" would in effect be Alvarado, himself. The

"reasonable person" becomes nonexistent and the test transforms from an objective test to a subjective test of whether the specific person felt free to terminate the interrogation and leave. A suspect's state of mind, however, has no substantial relevance to the indicia of custody. *Berkemer*, 468 U.S. at 442 n.35.

C. There Remains A Distinction Between The Voluntariness Of A Confession And *Miranda* Requirements

Amicus NACDL argues that, because there are concerns common to both voluntariness and custody, age and experience are therefore relevant both to voluntariness and to custody. NACDL Amicus Br. 18, 20; *see* Resp. Br. 23 (asserting that juvenile status creates a vulnerability that affects custody). But this Court has repeatedly held that *Miranda* serves a different purpose from the due process voluntariness test. *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000); *Berkemer*, 468 U.S. at 433 n.20. Amicus NACDL asserts, "age of a suspect is an important factor in determining whether the conduct of the government is objectively coercive." NACDL Amicus Br. 20. While the due process voluntariness test is concerned with whether one's will has been overborne by coercion, *Miranda* is only concerned with one type of coercion—that associated with custody. *Miranda*, 384 U.S. at 444.

Amicus NACDL lists special vulnerabilities that juveniles might suffer: inexperience, less education, less intelligence, smaller size, and lack of independent finances that might be used to "confine" a juvenile. NACDL Amicus Br. 21-22. No case has held that any of these factors are relevant for a "custody" determination. Additionally, NACDL's rationale does not appear to be limited to juveniles as some adults share these same "special vulnerabilities." NACDL's list of special vulnerabilities also does not suggest any clear limitations as to the type of vulnerabilities that could be considered in a custody

determination. While a juvenile's age and experience well might be proper factors for determining the voluntariness of a confession, they bear no relationship with "custody" for *Miranda* purposes. *Compare with Stein v. New York*, 346 U.S. 156, 185-86 (1953) (characteristics of the accused relevant to determining the voluntariness of a confession include the accused's age, sophistication, prior experience with the criminal justice system, and emotional state), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964).

This case highlights the error of Alvarado's premise that a factor relevant to coercion is necessarily relevant to the question of custody. At trial, Alvarado agreed that his participation in the interview "was all voluntary on [his] part" and he did not feel coerced or threatened in any way." J.A. 439. If his age and experience had no impact on the voluntariness of his confession, it seems incongruent that he should be able to claim that his age and experience bore any relationship as to whether he was in custody. Justice O'Connor's opinion in *Withrow v. Williams*, 507 U.S. 680, 709 (1993) noted:

> In case after case, the courts are asked on habeas to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. * * * * While these questions create litigable issues under *Miranda*, they generally do not indicate the existence of coercion—pressure tactics, deprivations, or exploitations of the defendant's weaknesses—sufficient to establish involuntariness.

Withrow, 507 U.S. at 709 (O'Connor, J., concurring in part and dissenting in part). The risk that a juvenile might perceive that he or she is in custody based upon subjective factors is not addressed by modifying *Miranda*'s custody determination, but likely is properly addressed by determining whether the confession is voluntary.

Furthermore, *Miranda* does not dispense with the requirement that a confession be voluntary to be admitted into evidence. *Dickerson*, 530 U.S. at 444. "We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession." *Berkemer*, 468 U.S. at 433 n.20. If a juvenile's will were overborne to render a confession involuntary, the confession would still be inadmissible, regardless of whether the juvenile was in custody to require *Miranda* warnings. Even if a juvenile defendant receives *Miranda* warnings and speaks, he or she may still assert that the statements were involuntary and thus inadmissible. *Dickerson*, 530 U.S. at 444. Law enforcement officers who fail to give *Miranda* warnings take the additional risk that the juvenile's statements will ultimately be found to be involuntary, thus requiring the suppression of the statements.

D. Including A Juvenile's Age and Experience For "Custody" Determinations Would Blur *Miranda* Advisement Guidelines For Law Enforcement Officers

Alvarado argues that law enforcement's duties will remain the same. He and amici JLC argue that law enforcement officers already are required to take some action upon learning that an individual is under the age of eighteen. Resp. Br. 29-30; JLC Amicus Br. 23-25. Alvarado ignores the impracticality of obtaining such information by law enforcement officers while on the scene of a crime. His argument also presumes that the individual will be forthright about his or her age and criminal history.

Even assuming that an officer is able to accurately obtain such information, Alvarado misses the point that an officer will be required to assess the significance of that age and experience as to custody. As explained in the Brief for the United States as *Amicus Curiae* Supporting Petitioner at page 19, such an assessment would be difficult, given the wide variety in physical, intellectual, emotional, and social development of

juveniles. In *New York v. Quarles*, 467 U.S. 649, 658 (1984), this Court recognized the importance of providing a "workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" It cannot be expected of officers that they master juvenile psychology and be able to calibrate their decisions of whether to give *Miranda* warnings. *Miranda*'s goal of providing effective guidance to law enforcement should not be forgotten. Accordingly, a juvenile's age and experience should not be considered in determining "custody" for *Miranda* purposes.

CONCLUSION

For these reasons and those stated in the Warden's opening brief, the judgment of the court of appeals should be reversed.

Dated: January 22, 2004

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In the Supreme Court of the United States

MICHAEL YARBOROUGH, WARDEN, PETITIONER

v.

MICHAEL ALVARADO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether a court must consider the age and experience of a juvenile in determining whether he is "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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In the Supreme Court of the United States

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MICHAEL YARBOROUGH, WARDEN, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a court must consider the age and experience of a juvenile in determining whether he is "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Although the States adjudicate most violations of law committed by minors, the Department of Justice also initiates proceedings against juveniles under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.* The Act authorizes the Attorney General to bring juvenile delinquency proceedings against a minor in certain circumstances, or to proceed against the minor as an adult if the juvenile consents in writing on the advice of counsel to a transfer to adult status, or (in the case of a minor aged 15 years or older) a court determines that transfer to adult status would be in the interest of justice. 18 U.S.C. 5032. In addition, every year, federal agents interview suspects who

are known to be (or are later discovered to be) juveniles. The United States has an interest in introducing into evidence voluntary, noncustodial statements that are reliable evidence of guilt, regardless of whether the federal agents or state officers who take the statements have correctly assessed the age and experience of those interviewed and correctly determined whether those characteristics rendered them more likely than similarly situated adults to believe themselves to be in custody.

STATEMENT

1. After midnight on the morning of September 23, 1995, respondent, Paul Soto, Manuel Rivera, and a group of acquaintances went to a shopping mall in Santa Fe Springs, California. There they saw a truck driven by an older man, later identified as Francisco Castaneda. In respondent's presence, Soto said, "Let's Jack," meaning to steal the truck. As Castaneda was standing outside of the truck, Soto approached the driver's side of the truck while respondent approached the passenger's side. A gun was fired, killing Castaneda, and the group fled to Rivera's house. Soto told Rivera that he had shot the driver when he refused to give him the keys to the truck. After Soto left the gun at Rivera's house, Rivera and respondent hid the gun in a park. Pet. App. C3-C4.

2. On October 24, 1995, Detective Cheryl Comstock of the Los Angeles County Sheriff's Department left a message at respondent's family home that she needed to speak with him. Detective Comstock then contacted respondent's mother at work. Respondent's mother told Comstock that her husband would bring respondent to the sheriff's station. Respondent's mother and father accompanied respondent to the station and gave Comstock permission to interview him. Pet. App. C12; J.A. 72-73. Comstock interviewed respondent alone. Pet. App. A8. At the time of the interview, respondent was 17 years and seven months old (see J.A. 344), had no criminal history, and had never before been questioned by the police.[1] Pet. App. A8.

The interview, which was tape recorded, lasted two hours, from 12:30 to 2:30 p.m., with one break when Comstock left for the restroom. Pet. App. C12-C13; J.A. 72, 135, 165. At trial, respondent agreed that the interview "was a pretty friendly conversation," J.A. 438; see J.A. 437 ("basically a low-key conversation"), and that although he was "a little nervous" (J.A. 353), his participation in the interview "was all voluntary on [his] part" and he did not "feel coerced or threatened in any way." J.A. 439. He could not remember whether the door of the interview room was open or closed. J.A. 352.

In the beginning of the interview, respondent recounted his activities on the evening of September 22 and morning of September 23, but omitted any reference to the shooting. J.A. 73-101. Detective Comstock stated that respondent's version of events was "pretty accurate," but had "left out the shooting." J.A. 101. When respondent said that he had not seen a shooting, Comstock replied that other witnesses had said "quite the opposite." *Ibid.* Comstock urged him to tell the truth, saying that because so many people were present at the shooting, it was inevitable that some of them would tell what had happened. J.A. 102. Respondent then said that he knew where the shooting occurred, but claimed that he did not remember seeing it. Comstock indicated that she knew respondent had approached the passenger side of the

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[1] The evidence in the record concerning the circumstances of the interview consists solely of Comstock's brief descriptive statements at the beginning and end of the interview (see J.A. 72-73, 165), respondent's trial testimony (J.A. 350-354, 437-439), and Comstock's trial testimony (J.A. 334-335; C.A. Supp. E.R. 193-197, 201-202). See generally *Carroll* v. *United States*, 267 U.S. 132, 162 (1925) (appellate court may consider trial evidence in reviewing pre-trial suppression ruling).

victim's truck before the shooting, but said that she thought respondent had no intention "of anything happening." J.A. 103.

Respondent stated that he had not killed Castaneda, but did not see what had happened because he had been on the far side of the truck. J.A. 104-105. Detective Comstock again urged respondent to tell the truth, stating that he did not owe anything to those responsible for the shooting because they were not his friends and had placed him in a bad position. J.A. 105-106. Respondent said that Soto had shot Castaneda, apparently because he had resisted Soto's attempt to take his truck. J.A. 110. Respondent said that after Soto had left the gun at Rivera's house, he and Rivera had hidden it in a park, and members of Soto's gang had retrieved it the next morning after respondent and Rivera had shown them where it was. J.A. 113-115; 146-149.

Approximately halfway through the interview, Detective Comstock asked respondent where he would be going "[w]hen we're done here today." J.A. 122. Respondent replied that he would return home. *Ibid.* They continued to discuss the shooting, particularly Soto's actions before the shooting. J.A. 123-134. Later in the interview, Comstock heard respondent's pager go off, and offered to let him use the telephone. When respondent declined the offer, Comstock stated that they "should be done here pretty quick" and respondent could then "go about [his] activities." J.A. 149-150. Comstock then asked respondent whether he needed to use the restroom or get a drink of water. Respondent replied that he did not. J.A. 151. At the conclusion of the interview, Comstock took respondent to rejoin his parents in the station lobby and the three of them left. Pet. App. C15; J.A. 165.

3. In December 1995, respondent was charged in state court with first-degree murder and attempted robbery. He moved to suppress the statements he had made to Detective

Comstock, arguing that he had been subjected to custodial interrogation without receiving the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court did not hear testimony, but relied on a transcript of the interview prepared from the recording Comstock made. Following argument, the court denied the motion. At trial, the prosecution played portions of respondent's interview for the jury, and respondent testified on his own behalf. Respondent was convicted of second-degree murder and attempted robbery. The court sentenced respondent to a term of imprisonment for 15 years to life on the murder conviction, and stayed imposition of sentence on the robbery conviction. Pet. 4; Pet. App. C5.

4. The California Court of Appeal affirmed. Pet. App. C1-C26. The court rejected respondent's claim that he had been subjected to custodial interrogation without receiving *Miranda* warnings. *Id.* at C11-C17. After describing respondent's interview in detail, the court contrasted his interview with one the court had found to be custodial in *People* v. *Aguilera*, 59 Cal. Rptr. 2d 587 (1996), in which police told the defendant they would not permit him to leave the station until he had told them the truth, and had engaged in "'tag team' interrogation" that was "intense, persistent, aggressive, confrontational, accusatory, and at times, threatening and intimidating." Pet. App. C16. The court explained:

> [Respondent] was not told he could not leave until he told the truth, and was not subjected to the intense and aggressive tactics employed by the officers in *Aguilera*. Although the officer[] made it clear to [respondent] that [she] disbelieved his early, exculpatory, version of events on the night of the murder, [she] did not fabricate evidence or subject him to the intense pressure used by the officers in *Aguilera*. We are satisfied that a reasonable

> person under the circumstances in which [respondent] was questioned would have felt free to leave. The interrogation was not custodial and no *Miranda* warnings were required.

Id. at C17. The California Supreme Court denied respondent's petition for review. *Id.* at A9.

5. Respondent then filed a petition for habeas corpus in the United States District Court for the Central District of California pursuant to 28 U.S.C. 2254, asserting that his statement should have been suppressed because he was "in custody" at the time of the interview. The district court, adopting the recommendation of the magistrate judge (Pet. App. B9), denied the petition, concluding that under the circumstances of the interview, "a reasonable person would have concluded he would be free to leave." *Id.* at B4. The court emphasized that respondent "was not informed he was under arrest and did receive indications he would be free to leave upon the conclusion of the interview" and that "Comstock never threatened or attempted to deceive [him]." *Id.* at B5. The court concluded that respondent was not entitled to habeas relief because the state court decision was not "contrary to," nor did it involve "an unreasonable application of," "clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at B7 (quoting 28 U.S.C. 2254(d)).

6. The court of appeals reversed. Pet. App. A6-A30. It held that a court must consider a juvenile suspect's age and experience in determining whether he was "in custody" and thus entitled to *Miranda* warnings. Noting that this Court had considered age and experience in determining the voluntariness of confessions under the Due Process Clause and the voluntariness of waivers of constitutional rights, see *id.* at A15, A17, the court concluded that there was "no principled reason why similar safeguards, commensurate with the age

and circumstances of a juvenile defendant, would not apply equally to an 'in custody' determination." *Id.* at A18-A19.

The court next held that "it is simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave." Pet. App. A26 (internal quotation marks and citation omitted). The court noted that Detective Comstock had involved respondent's parents to "arrange the police interview" (*id.* at A20) and thus concluded that his appearance was "obtain[ed] not through his own consent but instead through enlisting his mother's authority." *Id.* at A25. The court considered "most relevant[]" (*id.* at A16) that, in its view, Comstock had refused respondent's parents permission to attend the interview. See also *id.* at A8, A12, A14, A16, A18, A20, A25. The court emphasized respondent's "youth and inexperience with police" (*id.* at A18; see also *id.* at A8, A14), the duration of the interview, Comstock's expression of disbelief of respondent's initial version of events omitting the shooting (*id.* at A18), the fact that respondent was not informed that he was not under arrest (*id.* at A25), and the fact that Comstock had only told him that he was free to use the telephone, get a drink, or use the restroom "well into the course of the interview." *Id.* at A26.

The court concluded that respondent was entitled to federal habeas corpus relief pursuant to 28 U.S.C. 2254(d)(1), because the decision of the California Court of Appeal "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pet. App. A20-A26. The court also held that the improper admission of respondent's interview statements had a "substantial and injurious effect" on the jury's verdict. *Id.* at A26-A30. The court remanded with directions to grant respondent a conditional writ of

habeas corpus unless the State began proceedings to retry him within 120 days. *Id.* at A5.

SUMMARY OF ARGUMENT

The court of appeals reasoned that, because a person's age and experience are relevant to the voluntariness of a confession under the Due Process Clause and the waiver of constitutional rights, those personal characteristics must also be relevant to the determination of whether a juvenile is "in custody" under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). That conclusion overlooks the fundamental differences between the voluntariness test and *Miranda*.

The due process voluntariness test is used to determine whether a particular suspect's will was overborne by police interrogation. Accordingly, it considers both the circumstances of the interrogation and the subjective characteristics of the suspect. In contrast, the Court adopted *Miranda* to provide an additional degree of protection against the risk that an involuntary confession, taken during custodial interrogation, would be admitted into evidence. *Miranda* holds that, regardless of the suspect's personal characteristics, statements taken during custodial interrogation are inadmissible in the government's case in chief unless the suspect receives specified warnings. Because the *Miranda* warnings are required only when there has been a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (internal quotation marks omitted), the test focuses only on the restrictive circumstances of the interview, rather than on the suspect's perceptions of them. Although this Court has recognized that many of a suspect's personal characteristics are relevant to the due process voluntariness test, in the nearly 40 years since the *Miranda* decision, this Court never has held any of those personal characteristics to be relevant in determining whether a

person was subject to the functional equivalent of formal arrest.

This Court has often noted that one of the principal advantages of *Miranda* is that it provides police and courts with clear guidance about how custodial questioning must be conducted for statements obtained to be admissible. Because of the considerable advantage afforded by the clear guidance *Miranda* provides, this Court has stated that "the simplicity and clarity of the holding of *Miranda*" are not to be compromised "[a]bsent a compelling justification." *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984). The rule adopted by the court of appeals would add significantly to the complexity of *Miranda* in-custody determinations by requiring officers to ascertain the age and experience of suspects (neither of which is readily observed, and which suspects may not disclose), and then make difficult judgments about how those factors would likely affect their perception of events. The court of appeals' rule does not admit of ready limitations, but could be applied to persons with a variety of other personal characteristics. There is no need for such a drastic departure from traditional *Miranda* custody analysis, which provides ample incentives for police to provide *Miranda* warnings whenever officers believe there is a reasonable likelihood a suspect is in custody. In addition, Congress and the state legislatures have enacted a variety of statutory protections carefully tailored to address the vulnerabilities of minors undergoing official questioning.

Respondent was not in custody at the time of his interview. There is no indication that respondent was present at the interview involuntarily, and he was not handcuffed, arrested, or told he was not free to leave. Respondent was interviewed by a single officer, and agreed at trial that the encounter was a "friendly conversation" (J.A. 438) and was not confrontational. Taken as a whole, the objective circum-

stances indicate that respondent was not subject to the functional equivalent of formal arrest.

ARGUMENT

AGE AND EXPERIENCE ARE NOT RELEVANT CONSIDERATIONS IN DETERMINING WHETHER A JUVENILE IS "IN CUSTODY" UNDER *MIRANDA*

Under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), statements taken in custodial interrogation must be preceded by specified warnings in order to be admissible in the government's case in chief. Specifically, the suspect must "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. *Miranda* warnings are a prerequisite to admissibility, "however, 'only where there has been such a restriction on a person's freedom as to render him "in custody."'" *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)). In determining whether an individual was in custody, "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury*, 511 U.S. at 322 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)). That determination involves what this Court has emphasized is "an objective test" (*Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995)): a court must look to "the objective circumstances of the interrogation" (*Stansbury*, 511 U.S. at 323) and, based on them, determine "how a reasonable man in the suspect's position would have understood his situation." *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984).

The Ninth Circuit held that in determining whether a juvenile is "in custody" for *Miranda* purposes, courts must apply a different test. Under its decision, courts must determine whether a reasonable person *of the juvenile's age* and *with that juvenile's experience in the criminal justice system* would have felt "at liberty to terminate the interrogation and leave." Pet. App. A26 (quoting *Thompson*, 516 U.S. at 112). That holding improperly transforms what is designed to be an objective examination of the restrictiveness of the circumstances surrounding an interrogation into a subjective inquiry into the vulnerability of the person questioned. It also places on officers the burden of predicting how often-unknown characteristics will affect the suspect's perception of his situation, and undermines the simplicity and clarity of the *Miranda* rule. The judgment of the court of appeals should be reversed.

A. The *Miranda* Custody Determination Requires An Objective Examination Of Restrictions On Freedom Of Movement

1. The Due Process Voluntariness Test And Miranda *Serve Fundamentally Different Purposes*

The Ninth Circuit reasoned that, because a person's age and experience are of central importance in determining the voluntariness of a confession under the Due Process Clause and the waiver of constitutional rights, therefore, "[i]t cannot reasonably be argued that a factor that is so important in analyzing the conduct of a custodial interrogation can become insignificant in the analysis of * * * whether a juvenile is, in fact, 'in custody.'" Pet. App. A23. The Ninth Circuit's decision overlooks that *Miranda* and the voluntariness test serve very different purposes.

Before *Miranda*, this Court "evaluated the admissibility of a suspect's confession under a voluntariness test" (*Dickerson* v. *United States*, 530 U.S. 428, 433 (2000)), whose "primar[y]" (*ibid.*) constitutional basis was the Due Process Clause. Under the due process test, in order to determine whether a particular "defendant's will was overborne"

(*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973)) during interrogation, a court must engage in "a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein* v. *New York*, 346 U.S. 156, 185 (1953).

Accordingly, the due process test considers "both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. Under the voluntariness test, relevant factors to be considered include "the crucial element of police coercion, the length of the interrogation, its location, its continuity," as well as "the defendant's maturity, education, physical condition, and mental health." *Withrow* v. *Williams*, 507 U.S. 680, 693-694 (1993) (citations omitted). As the Ninth Circuit noted (Pet. App. A15, A17), this Court has held that a defendant's age and experience with the justice system are factors in determining the voluntariness of confessions and of waivers of constitutional rights.[2]

Miranda developed in significant part as a response to perceived difficulties in applying the due process voluntariness test. The voluntariness test was considered difficult "for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444.

[2] See, *e.g.*, *Miller* v. *Fenton*, 474 U.S. 104, 117 (1985) ("the defendant's prior experience with the legal process" is a "subsidiary question" to voluntariness); *Gallegos* v. *Colorado*, 370 U.S. 49, 54 (1962) (14-year-old was "not equal to the police in knowledge and understanding of the consequences of the questions * * * [and] is unable to know how to protect his own interests"); *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) (when voluntariness of confession by a child is at issue, "special care in scrutinizing the record must be used"); *In re Gault*, 387 U.S. 1, 55 (1967) (considering youth of defendant in addressing voluntariness of waiver); see also *North Carolina* v. *Butler*, 441 U.S. 369, 374-375 (1979) (determining the voluntariness of a waiver of constitutional rights requires consideration of, among other factors, the "background, experience, and conduct of the accused"); *Schneckloth*, 412 U.S. at 248 & n.37.

In addition, "the advent of modern custodial interrogation brought with it an increased concern about confessions obtained by coercion," *id.* at 434-435, and "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements." *Id.* at 435. Accordingly, the Court determined that "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." *Id.* at 442 (citation omitted).

In contrast to the voluntariness test, which considers the conduct of law enforcement as applied to a particular suspect to determine whether his will has been overborne, see *Schneckloth*, 412 U.S. at 226, the *Miranda* custody test is, by design, "an objective test." *Thompson*, 516 U.S. at 112. Because "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest" (*Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495)), the test necessarily focuses on the restrictive circumstances themselves rather than on the suspect's perceptions of them.

In determining whether "indicia of arrest [are] present," *Beheler*, 463 U.S. at 1123, the Court has looked to such factors as the location where the questioning occurs (whether at a police station, in the suspect's own home, or in public),[3] the

[3] See, *e.g.*, *Berkemer*, 468 U.S. at 438 (noting that detained motorist was in view of public in holding that he was not "in custody" during traffic stop); *Beckwith* v. *United States*, 425 U.S. 341, 343-344 (1976) (holding that questioning at the suspect's home was noncustodial); *Miranda*, 384 U.S. at 477 ("General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens * * * is not affected by our holding.").

use of force or restraints,[4] the length of the interview,[5] and the number of officers present.[6] See generally 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.6(d)-(f) (2d ed. 1999) (discussing relevant factors). The Court has observed that "[o]ur decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the persons being questioned." *Stansbury*, 511 U.S. at 323. To determine whether the circumstances surrounding questioning are sufficiently restrictive to constitute custody, the Court looks to "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442.

2. *The Characteristics Of Individual Suspects Are Not Relevant To Determining Whether They Are "In Custody" Under* Miranda

This Court has rejected claims that the individual characteristics of those questioned must be considered in determining whether they were "in custody" for *Miranda* purposes. For example, the defendant in *California* v. *Beheler*, *supra*, had voluntarily agreed to accompany police to the station house to answer questions about a shooting he had reported. Although he was told he was free to leave, he was not given *Miranda* warnings and made a statement that was

[4] Compare *New York* v. *Quarles*, 467 U.S. 649, 655 (1984) (holding that questioning was custodial when suspect "was surrounded by at least four police officers and was handcuffed" when questioned); *Mathiason*, 429 U.S. at 495 (no restrictions on freedom of action while at police station).

[5] See *Berkemer*, 468 U.S. at 437 (noting traffic stops are "presumptively temporary and brief").

[6] See *Berkemer*, 468 U.S. at 438 (noting the fact that "the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability" in holding that persons detained for traffic stops are not "in custody"); *Quarles*, 467 U.S. at 655 (noting presence of "at least four police officers" in determining that suspect was "in custody").

introduced against him at his trial for first-degree murder. The California Court of Appeal reversed his conviction, holding that the interview with police constituted custodial questioning. "Although the indicia of arrest were not present" (463 U.S. at 1123), the court nevertheless concluded the defendant was "in custody." In so holding, the court considered various personal characteristics of the defendant at the time of the interview that, the court believed, made him more susceptible to coercion, such as the fact that he "had been drinking earlier in the day, and was emotionally distraught." *Id.* at 1124-1125. This Court reversed, specifically rejecting the claim that the defendant was "'coerced' because he was unaware of the consequences of his participation" in the interview. *Id.* at 1125 n.3. The Court noted that the defendant had "cite[d] no authority to support his contention that his lack of awareness transformed the situation into a custodial one."[7] *Ibid.* Compare *Gallegos* v. *Colorado*, 370 U.S. 49, 54 (1962) (concluding that confession was involuntary in part because suspect lacked adequate "understanding of the consequences of the questions" asked during interrogation).

[7] To support its conclusion that a suspect's experience with law enforcement (or lack of such experience) was relevant to the custody determination, the Ninth Circuit cited (Pet. App. A13-A14) a passage in *Minnesota* v. *Murphy*, 465 U.S. 420, 433 (1984), in which the Court discussed how a probationer's experience with his probation officer would "insulate him from psychological intimidation that might overbear his desire to claim the [Fifth Amendment] privilege." *Murphy* does not suggest that this Court considered that defendant's personal characteristics in determining whether he was "in custody" for *Miranda* purposes. As the Court made clear in *Murphy*, that case did not involve a *Miranda* claim because the defendant, though a probationer responding to his probation officer's request to attend an interview, was not "in custody." *Id.* at 430. The Minnesota Supreme Court had held by "analogy to *Miranda*" (*id.* at 433) that the probationer's failure to invoke his Fifth Amendment privilege was excusable because of the coercive atmosphere of the interview. The Court rejected that position.

The objective focus of the *Miranda* custody inquiry is especially striking in comparison to the variety of personal characteristics held relevant in the due process voluntariness inquiry. This Court has recognized that many personal characteristics of the suspect—*i.e.*, lack of education, low intelligence, and poor physical condition—are relevant to voluntariness determinations because they bear on the suspect's ability to resist coercion or to appreciate the implications of his actions. See, *e.g.*, *Clewis* v. *Texas*, 386 U.S. 707, 712 (1967) (concern about adult suspect's faculties given "additional weight" because he "had only a fifth-grade education"); *Payne* v. *Arkansas*, 356 U.S. 560, 562 n.4, 567 (1958) (emphasizing that suspect was "mentally dull"); *Fikes* v. *Alabama*, 352 U.S. 191, 196, 198 (1957) (holding that pressure applied against suspect who was "weak of * * * mind" and of "low mentality" rendered statement involuntary); *Greenwald* v. *Wisconsin*, 390 U.S. 519, 520-521 (1968) (per curiam) (emphasizing that suspect did not have his blood-pressure medication); *Clewis*, 386 U.S. at 712 (noting that suspect's faculties were impaired by "sickness"). But in the nearly four decades since *Miranda*, this Court *never* has held any of those personal characteristics to be relevant in determining whether a person was subject to "the functional equivalent of formal arrest."[8] *Berkemer*, 468 U.S. at 442.

[8] Just as the subjective views of suspects are irrelevant to determining custody, so are the subjective views of police. In *Berkemer* v. *McCarty*, this Court held it was irrelevant to the custody determination that a trooper "decided as soon as [a motorist] stepped out of his car that [he] would be taken into custody" (468 U.S. at 442), observing that "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Ibid.* This Court likewise has held that the fact that "interrogating officers have focused their suspicions upon the individual being questioned * * * is not relevant" to whether he is in custody, unless that fact is communicated to the suspect and thereby is relevant "to the extent [it] influenced the objective conditions surrounding the interrogation." *Stansbury*, 511 U.S. at 326.

That is because the *Miranda* inquiry is designed to identify when the general pressures of custodial interrogation exist; it is only then that the rule of *Miranda* comes into play. See *Dickerson*, 530 U.S. at 434-435. *Miranda*, however, is not a substitute for the case-specific voluntariness inquiry under the due process test. *Id.* at 444.

In short, a suspect's personal characteristics, including age and experience with the criminal justice system, are not relevant to the objective inquiry under *Miranda* of whether restraints imposed are tantamount to those attendant to formal arrest.

B. The Ninth Circuit's Rule Would Undermine *Miranda*'s Purpose Of Providing Clear Guidelines For Police And Courts

As the Court "ha[s] stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986) (quoting *Berkemer*, 468 U.S. at 430). *Miranda*, this Court has said, has the "important virtue of informing police and prosecutors with specificity as to how a pretrial questioning of a suspect must be conducted" in order for custodial interrogation to result in admissible statements. *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (internal quotation marks omitted). Because *Miranda* provides "safeguards" that are "'prophylactic in nature" and that operate to exclude unwarned statements obtained even if they would not be considered "involuntary in traditional terms," *Withrow*, 507 U.S. at 690; accord *Dickerson*, 530 U.S. at 444, the Court has emphasized the importance of maintaining the clarity of the *Miranda* rule.

"At least in part in order to preserve its clarity," this Court "ha[s] over the years refused to sanction attempts to

expand [the] *Miranda* holding," *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (collecting authorities), in recognition of the importance of providing "a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Ibid.* Because of the considerable advantages afforded by the clear guidance *Miranda* provides, this Court has indicated it will not compromise "the simplicity and clarity of the holding of *Miranda*" "[a]bsent a compelling justification." *Berkemer*, 468 U.S. at 432.

The objective nature of the "in custody" test directly advances *Miranda*'s interest in providing clear guidance. Because it bases custody determinations on an examination of readily observable conditions surrounding an interview, it provides police and the courts relatively clear and objective criteria by which to determine whether, in situations short of formal arrest, a suspect is in custody for *Miranda* purposes. Cf. *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988) (the objective "reasonable person" standard governing whether police conduct constitutes a seizure "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached").

In *Berkemer* v. *McCarty*, *supra*, this Court supported its adoption of the "reasonable person" standard for custody determinations by citing the seminal case of *People* v. *P.*, 233 N.E.2d 255, 260 (N.Y. 1967), in which New York's highest court applied an objective "reasonable man" standard in holding that a 16-year-old suspect was not in custody for *Miranda* purposes when he was interrogated by a police officer outside his home. This Court cited *People* v. *P.* for the proposition that "an objective, reasonable-man test is appropriate because, unlike a subjective test, it * * * 'does [not] place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" *Berkemer*, 468 U.S. at 442 n.35. Commentators and courts have likewise noted the value of employing an objective standard that does not consider the characteristics of individual suspects or officers, because of the clearer guidance it provides police. See, *e.g.*, Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 152 (noting that objective approach "has been widely endorsed by courts and commentators alike" because it "eliminates the difficulties of determining states of mind, and does not hold the police responsible for the idiosyncracies of particular defendants"); *United States* v. *Macklin*, 900 F.2d 948, 951 (6th Cir.) (same), cert. denied, 498 U.S. 840 (1990); *United States* v. *Phillips*, 812 F.2d 1355, 1359-1360 (11th Cir. 1987) (same).

The rule adopted by the court of appeals would add significantly to the complexity of *Miranda* in-custody determinations by requiring officers in the field to make difficult determinations about the age, maturity, and experience of the suspect, often based on poor or nonexistent information. It is well established that "adolescence is a period of tremendous variability" in physical, intellectual, emotional, and social development. Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 24 (Thomas Grisso & Robert G. Schwartz, eds., 2000) (*Developmental Psychology*). Because of wide variations in the physical maturity of adolescents,[9] police frequently will be unable to determine whether they are dealing with a juvenile if the subject is not carrying identification

[9] Most police interaction with suspects who are minors involves adolescents between the ages of 12 and 18. *Developmental Psychology*, *supra*, at 23. "[A]lthough preadolescent crime generates tremendous media coverage, it remains an extremely rare occurrence with such low incidence" that it should not be the focus of juvenile justice policymaking. *Ibid.*

or lies about his age (for example, to avoid arrest for a curfew violation, unlawful possession of alcohol or cigarettes, or any other activity unlawful because of the suspect's age). While it ordinarily would be apparent to the police if a subject is a young juvenile (below, say, age 15), it may not be readily apparent in the case of minors in their later teens, such as respondent here (who was only five months from his eighteenth birthday at the time of the interview).[10] Even if officers are able accurately to determine a subject's age, it will be difficult for a police officer to accurately assess whether and how a reasonable 17-year-old would perceive his situation differently than would a reasonable 15-year-old or a reasonable 18-year-old.

Even if police reasonably can be expected to correctly ascertain the suspect's age and accurately gauge how a reasonable person of that age would perceive his situation, they cannot realistically be expected to determine in every case the juvenile's experience with the criminal justice system, much less conclude how that experience would affect a reasonable juvenile's perceptions. See *Berkemer*, 468 U.S. at 430-431 (noting that "whether the suspect has previously committed a similar offense or has a criminal record of some

[10] Even if the Ninth Circuit were justified in adopting a "reasonable juvenile" rule, see Pet. App. A26, the court did not adequately justify including very late adolescents (such as respondent) in that category. There is a consensus in the developmental literature that children in late adolescence have intellectual development and competency comparable to adults. See, *e.g.*, Elizabeth S. Scott, *The Legal Construction of Childhood, in A Century of Juvenile Justice* 113, 120 (Margaret K. Rosenheim et al., eds., 2002) ("Developmental psychology supports the view that by age eighteen, and certainly by age twenty-one, most individuals attain the presumed adult competency."); *Developmental Psychology, supra*, at 26 (noting that the "intellectual abilities of older adolescents are comparable to those of adults"). Reflecting that fact, many States that have adopted specific protections for minors subject to official questioning have limited their coverage to younger children (typically below the age of 16). See pp. 24-25, *infra*.

other kind" are "circumstances unknowable to the police"). There is no reason to believe that suspects will be forthcoming with accurate recitations of their criminal histories, and it is not uncommon for people to disguise their identities from police, frustrating attempts to use automated databases to retrieve such information. Thus, police would have no reliable way of determining whether or not they must administer *Miranda* warnings. As this Court has observed, "[i]t would be unreasonable to expect the police to make guesses * * * before deciding how they may interrogate the suspect."[11] *Berkemer*, 468 U.S. at 431.

Moreover, the court of appeals' rationale does not admit of ready limitations. The court of appeals drew the age and experience of the suspect from a long list of personal characteristics this Court has recognized to be relevant to determining the voluntariness of a confession, see Pet. App. A15, and the court did not contend that those two factors are uniquely central to voluntariness. A wide variety of people —both adults and minors—have physical or psychological traits that arguably make it more likely they would consider any interaction with police to entail a serious restriction on their freedom of movement. Individuals with low intelligence, people with mental infirmities, people whose cultural background encourages compliance with police requests or

[11] In addition, requiring consideration of how the suspect's criminal history would affect perception would make *Miranda* more difficult by introducing "doctrinal complexit[y]." *Berkemer*, 468 U.S. at 431. Under the court of appeals' rule, it would be an open question whether the inquiry turned solely on the existence of prior arrests or convictions, or whether courts should consider the relationship of the prior offenses to the current charge. It would likewise be an open question whether prior experience (particularly for similar offenses) would support or detract from a finding of custody: after all, it may be argued that persons previously arrested or convicted of a certain offense may be more inclined than those with no criminal history to believe that police who speak to them will not permit them to leave.

causes them to view police with suspicion all might read into their interactions with police coercion that is not apparent from the objective circumstances.[12] If individual characteristics such as these were taken into account in making custody determinations for *Miranda*, the threshold determination of *Miranda*'s applicability would soon become indistinguishable from the exhaustive totality-of-the-circumstances test whose complexity was part of the impetus for establishing a bright-line rule. Even before its opinion in this case, the Ninth Circuit had already begun to head down that road. In *United States* v. *Beraun-Panez*, 812 F.2d 578, modified, 830 F.2d 127 (1987), the court adopted a "refined objective standard" (*id.* at 581) for *Miranda* custody determinations requiring courts to "focus on how a reasonable person *who was an alien* would perceive" circumstances surrounding questioning. *Ibid.* (emphasis added).

There is no justification for such a drastic departure from traditional *Miranda* custody analysis. The prospect that an unwarned statement will be inadmissible in the prosecution's case in chief provides police a significant incentive to give *Miranda* warnings whenever officers believe there is a rea-

[12] See *United States* v. *Salyers*, 160 F.3d 1152, 1159 (7th Cir. 1998) (rejecting claim that defendant's military experience, which "trained [him] to obey orders from those in authority," should be considered in determining whether he was in custody for *Miranda* purposes); *United States* v. *Macklin*, 900 F.2d at 950-951 (rejecting claim that mental retardation rendered defendant "in custody" when she was interviewed by police in front of her house); *United States* v. *Chalan*, 812 F.2d 1302, 1307 (10th Cir. 1987) (rejecting claim of Indian that he was "in custody" for *Miranda* purposes because, by tribal custom, he could not refuse the request of tribal governor to answer FBI agents' questions about a crime), cert. denied, 488 U.S. 983 (1988); *United States* v. *Welch*, No. CR-3-9-98, 1992 WL 1258524, at *4 (S.D. Ohio Mar. 19, 1992) (finding irrelevant defendant's contention that, as a military wife, she interpreted an Air Force investigator's request to attend an interview as an order; "[defendant's] attempt to transform the 'reasonable man' test into a 'reasonable military wife' test must be rejected").

sonable likelihood the suspect is "in custody." Cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief"). Police officers who engage in questioning before giving *Miranda* warnings also run the risk of a judicial finding that the statement was coerced. *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966). In that event, any statement would be unusable for any purpose, physical evidence derived from the statement might have to be suppressed, and before any subsequent statements were admissible, the court would have to carefully examine such factors as lapse of time and the presence or absence of intervening circumstances to decide whether the coercion "ha[d] carried over into the second confession." *Oregon* v. *Elstad*, 470 U.S. 298, 310 (1985). The incentive to give *Miranda* warnings is especially great when the officer is interviewing someone known to be a juvenile, because it is well established that age and experience with the justice system weigh heavily in voluntariness determinations. See generally *Gallegos*, 370 U.S. at 54.

In contrast, officers who give *Miranda* warnings and obtain explicit waivers before speaking with the accused are far more likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Dickerson*, 530 U.S. at 444 (quoting *Berkemer*, 468 U.S. at 433 n.20). Thus, rejection of the court of appeals' position will leave police with strong incentives to give *Miranda* warnings to minors before questioning them. In sum, the rule adopted by the court of appeals undermines *Miranda*'s "central virtue" (*Moran*, 475 U.S. at 426) of providing clear and work-

able guidelines to police and courts, without contributing significantly to the protection *Miranda* affords.

In addition to existing federal constitutional protections, both Congress and many state legislatures have enacted specific and detailed statutory protections for juveniles subject to official questioning. These statutes often provide graduated protections commensurate with the age of the child, and reflect the legislatures' considered judgment about the appropriate degree of protection required for children of various ages. Some state statutes furnish protections to juveniles who are questioned by police (such as requiring advice of rights, or that a parent or counsel be present), regardless of whether they are in custody at the time.[13] Some state statutes provide for the exclusion of any statement made during custodial questioning unless a parent or "interested adult" is present.[14] Others hold that a minor may

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[13] See, *e.g.*, N.M. Stat. Ann. § 32A-2-14(C) (Michie 1999) (juvenile must be advised of rights and waiver obtained before questioning); W. Va. Code § 49-5-2-(*l*) (2001) (extrajudicial statements made by child under age 14 "to law-enforcement officials" inadmissible unless made "in the presence of the juvenile's counsel"; statements made by child between 14 and 16 inadmissible unless made in the presence of counsel or made in the presence of, and with the consent of, parent or custodian who has been informed of child's rights).

[14] See Colo. Rev. Stat. § 19-2-511(1) (2001) (with limited exceptions, statement made by juvenile as a result of custodial interrogation inadmissible unless parent, guardian, or counsel was present and was advised of juvenile's rights); Conn. Gen. Stat. Ann. § 46b-137(a) (West 1995 & Supp. 2003) (statements inadmissible "unless made by such child in the presence of his parent," after both were advised of their rights); see also *State* v. *Ledbetter*, 818 A.2d 1 (Conn. 2003) (statute inapplicable when child prosecuted as adult); N.C. Gen. Stat. § 7B-2101(b) (2001) (statement by child under age 14 inadmissible unless made in the presence of attorney or parent or guardian who has been advised of minor's rights); Okla. Stat. Ann. tit. 10, § 7303-3.1(A) (West 1998) (statement of child under age 16 taken while in custody inadmissible unless made in presence of parent, guardian, adult relative, or attorney, after being informed of child's rights).

not validly waive the right to remain silent or to counsel unless the minor has the assistance of counsel or has consulted with a parent or guardian.[15] Other statutes provide that statements made by children below certain ages are per se inadmissible (or presumptively inadmissible).[16] Similarly, the Federal Juvenile Delinquency Act, 18 U.S.C. 5033, provides (among other protections) that an arresting officer must notify a juvenile's parents that their child is in custody, and inform both the parents and the child of the child's rights. These statutory schemes provide minors with far more carefully calibrated protection than that afforded by the court of appeals' rule.

C. Respondent Was Not In Custody At The Time Of His Interview

An analysis of the objective conditions surrounding respondent's interview demonstrates that respondent's freedom was not curtailed to a degree associated with formal arrest. Although respondent came to the Sheriff's office at Deputy Comstock's request, there is no indication that his presence there was involuntary. Cf. *Mathiason*, 429 U.S. at 495 (noting that suspect's "came voluntarily to the police station" though he went there in response to officer's request to talk). There is likewise no indication that Comstock said anything to respondent's mother to indicate that she or

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[15] See Mont. Code Ann. § 41-5-331 (2001) (when child taken into custody, must be advised of rights and parents informed; child under 16 may waive right to silence or to counsel only with agreement of parent, guardian, or counsel); Ind. Code Ann. § 31-32-5-1 (Michie 1997) (waiver only by counsel or by parent or guardian with child after "meaningful consultation"); Iowa Code § 232.11(2) (West 2000) (with certain exceptions, child under 16 may waive right to counsel only with written consent of parent or guardian; child 16 or older may waive only after good-faith effort to notify parent or guardian that the child is in custody).

[16] N.M. Stat. Ann. § 32A-2-14(F) (Michie 1999) (confessions by child under age 13 are inadmissible; rebuttable presumption that confession of child aged 13 or 14 is inadmissible).

her son was legally required to attend. Any ambiguity was dispelled upon the arrival of respondent and his parents at the station, when Comstock explicitly sought and received the parents' "permission for [her] to interview their son." J.A. 73. Although Comstock apparently did not explicitly seek respondent's permission to be interviewed, there is no indication that respondent did not wish to be interviewed.[17] Cf. J.A. 439 (respondent agreed at trial that the interview "was all voluntary on [his] part").

The court of appeals suggested (Pet. App. A16) that by calling respondent's parents, Comstock "enlisted the[ir] parental control" over respondent and thereby restricted his freedom of movement. In the absence of some evidence that Comstock indicated that respondent and his parents were legally required to come to the station and remain there, any such restriction would stem from respondent's presumed desire to obey his parents' wishes. But practical restrictions of that sort do not constitute a "'restraint on freedom of movement' of the degree associated with a formal arrest." *Minnesota* v. *Murphy*, 465 U.S. 420, 430 (1984) (quoting *Beheler*, 463 U.S. at 1125); *id.* at 433 (holding that "any compulsion [a probationer] might have felt" because of possibility his probation officer would revoke his probation if he left

[17] Although the court of appeals emphasized that there was no "manifestation of assent by [respondent]" (Pet. App. A16) to going to the station, that reflects an incorrect understanding of the respective burdens of the parties. Respondent bore the burden of proving circumstances tantamount to formal arrest. See, *e.g.*, *United States* v. *Madoch*, 149 F.3d 596, 601 (7th Cir. 1998) (the defendant "ha[s] the burden of making a *prima facie* showing of illegality" to support claim he was "in custody" when statement was given); *United States* v. *Webb*, 755 F.2d 382, 390 (5th Cir. 1985) ("the defendant bears the burden of demonstrating that statements which the defendant seeks to suppress were made while the defendant was under custodial interrogation"); cf. *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.").

the interview was insufficient to render him "in custody"). For similar reasons, to the extent the court of appeals' conclusion was based on a belief that a "reasonable 17-year-old" (Pet. App. A26) would have felt constrained to remain at the station out of respect for an authority figure, that too would be insufficient. *People* v. *P.*, 233 N.E.2d at 261 (subjective inhibition against leaving "out of respect for an officer of the law" is insufficient to render person "in custody").

Nor was the atmosphere of the interview "police dominated." *Berkemer*, 468 U.S. at 439. Respondent was not handcuffed, arrested, told that he was not free to leave, or subject to intimidation. He was interviewed by a single officer, and respondent agreed at trial that the episode "was basically a low-key" and "friendly conversation." J.A. 437-439. Although the court of appeals emphasized its understanding that respondent's parents "were refused permission to be present during the interview" (Pet. App. A8; accord *id.* at A12, A14, A16, A18, A20, A25), nothing in the record indicates why respondent's parents were not present in the interview room. (Respondent's attorney asserted during the suppression hearing that the parents were refused permission to be present, but there are no state-court findings on the subject. See J.A. 186, 190.) In any event, because police routinely interview witnesses alone so that their testimony is not affected by the presence of others, exclusion of the parents from the interview room is not an indication that respondent was in custody.

Although Comstock expressed disbelief when respondent said he was not present at the time of the shooting (J.A. 101), her initial questioning was consistent with the idea that respondent was merely a witness to events. Tellingly, when Comstock asked respondent, halfway through the interview, where he would be going "[w]hen we're done here today" (J.A. 122), respondent expressed no surprise that he was not in custody and simply replied that he would "be going[] back

home." *Ibid.* It was not until after respondent indicated his awareness that he was free to leave after the interview that he admitted knowing before the shooting that Soto had a gun. J.A. 123. Later in the interview, Comstock confirmed that respondent was free to use the telephone, get a drink, or use the restroom, and explicitly indicated that respondent would be free to leave after the interview, which he did. J.A. 149-151; see generally *Mathiason*, 429 U.S. at 495. Thus, taken as a whole, the objective circumstances of the interview clearly indicate that respondent was not subject to the "the functional equivalent of formal arrest." *Berkemer*, 468 U.S. at 442.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 02-1684

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden of California State Prison-Los Angeles, County,

Petitioner

v.

MICHAEL ALVARADO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Juvenile Law Center, Children and Family Justice Center, Juvenile Justice Project of Louisiana, Legal Services for Children, Mexican American Legal Defense and Educational Fund, National Council of La Raza, Public Defender Service for the District of Columbia, San Francisco Public Defender's Office, Southern Center for Human Rights, Youth Law Center; Hon. David B. Mitchell; and 13 professors representing the fields of law, psychiatry, and psychology as *AMICI CURIAE* In Support of Respondent

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INTEREST OF THE *AMICI*[1]

The organizations and individuals submitting this brief work with and on behalf of adolescents in a variety of settings. Some provide direct representation to minors who become involved in the juvenile justice and child welfare systems. Some work to create laws and policies that promote the fair treatment and well-being of youth in these systems. Others are psychologists, psychiatrists, and law professors with expertise in adolescent development and its relevance to the law. They join in this brief to assert that law enforcement officials must take into account age and lack of experience with the justice system in assessing whether a reasonable youth would believe he was in custody during police interrogation.

IDENTITY OF THE *AMICI*[2]

Juvenile Law Center; Children and Family Justice Center; Juvenile Justice Project of Louisiana; Legal Services for Children; Mexican American Legal Defense and Educational Fund; National Council of La Raza; Public Defender Service for the District of Columbia; San Francisco Public Defender's Office; Southern Center for Human Rights; Youth Law Center; the Honorable David B. Mitchell; and Professors Marie Banich, Jeffrey Fagan, Barry Feld, Martin Guggenheim, Randy Hertz, Paul Holland, Alan M. Lerner, Wallace Mlyniec, Edward P. Mulvey, Catherine J. Ross, Elizabeth Scott, Annie Steinberg, Laurence Steinberg.

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] A brief description of each of the organizations and individuals listed herein appears at Appendix A.

STATEMENT OF FACTS

Amici adopt the statement of facts as articulated in the brief of Respondent, Michael Alvarado [hereinafter Michael].

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly considered Michael's age and lack of experience with the criminal justice system in determining whether Michael was in custody during police interrogation. This Court cannot reverse the Ninth Circuit's decision without repudiating more than 60 years of its own jurisprudence that has consistently recognized the developmental differences between minors and adults in articulating and defining the scope of their legal and constitutional rights. Importantly, a reversal in this case would excuse law enforcement officers from considering the objectively knowable facts of youth and inexperience in assessing whether a minor is in custody for the purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966) in all cases involving minors – *whether the youth is 17, 15, 12, 10 or 8 years-old.* Such a result would run contrary to the very rationales behind this Court's holding in *Miranda*.

This Court's reliance on the developmental and situational differences of youth is manifest in its holdings in children's rights cases over the last 60 years. In the Fifth Amendment context, this Court's requirement that special precautions and procedures adhere when minors are interrogated is based squarely on its findings that minors are generally less mature, more submissive in the face of police authority, and lack critical knowledge and experience, as compared to adults. Under the Fourth Amendment, minors' rights have been diminished as this Court has pronounced that minors are "always in some form of custody"and they lack the right to come and go at will. Decisions construing minors' rights under other constitutional provisions likewise endorse either greater

protections or more limited rights based upon minors' distinct developmental characteristics. Lastly, a myriad of state statutes and case law treat minors differently across a number of domains, mirroring the legal boundaries between adults and children so solidly established by this Court.

Scholarly research in the field of adolescent development confirms the developmental and social differences upon which these longstanding legal distinctions are based. This scholarship tells us that a number of "psychosocial factors" impact adolescent perceptions, judgment and decision-making and limit their capacity for autonomous choice. These psychosocial factors include present-oriented thinking, egocentrism, less experience and greater vulnerability to stress and fear than adults, and greater conformity to authority figures. More recent research into the structure and function of the adolescent brain further supports these findings. Together, the psychological and neurological research explain why a reasonable juvenile will have a lower threshold for believing that he is in custody as compared to a reasonable adult, and why Michael would not have felt he was free to leave the interrogation room at the police station.

Finally, Petitioner's argument that affirmance of the Ninth Circuit's decision would additionally burden law enforcement officials is completely without merit. Pursuant to a broad patchwork of federal, state and local laws, police officers must routinely determine whether individuals are minors and then take certain actions in response to this knowledge. Petitioner's argument is all the more specious in this case, where law enforcement readily acknowledged Michael's juvenile status and, rather than contact Michael directly, asked his parents to bring him to the station.

ARGUMENT

I. UNITED STATES SUPREME COURT JURISPRUDENCE, AS WELL AS STATE STATUTES AND CASE LAW, CONSISTENTLY TAKE ACCOUNT OF THE DEVELOPMENTAL DIFFERENCES BETWEEN MINORS AND ADULTS IN DETERMINING MINORS' CONSTITUTIONAL AND LEGAL RIGHTS

A. This Court Has Historically Viewed Minors' Constitutional Rights Through a Discrete Lens, Extending Greater Protections or Fewer Rights To Minors Based Upon Their Distinctive Developmental and Social Characteristics

That minors are "different" is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights for the last sixty years.[3] The Ninth Circuit's holding that Michael's juvenile status was relevant to

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[3] Further, the Court's legal decisions with respect to minors establish the age of majority as the all-important line between childhood and adulthood. Almost all states set the age of majority at age eighteen, although some states (i.e., Alabama and Nebraska) set it at age nineteen. J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77, 78 n.1 (2003)

the determination of whether he was 'in custody' for *Miranda* purposes falls squarely within this jurisprudential framework.

For example, in cases involving related law enforcement issues, this Court has demarcated a legal distinction between minors and adults for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. Thus, the Court has recognized that minors are generally less mature than adults and, therefore, are more vulnerable to coercive interrogation tactics. As the Court first recognized in *Haley v. Ohio*, 332 U.S. 596 (1948), in suppressing the statement of a fifteen-year old defendant taken outside of the presence of his parents, a teenager

> cannot be judged by the more exacting standards of maturity. *That which would leave a man cold and unimpressed can overawe and overwhelm a lad…* [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Haley at 599-600 (emphasis added).

The Court also has noted that minors generally lack critical knowledge and experience, and have a lesser capacity to understand, much less exercise, their rights when they are "made accessible only to the police." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14 year-old boy outside of his parent's presence to be involuntary.) And in *In re Gault*, 387 U. S. 1, 55 (1967), where the Court extended many key constitutional rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youth's special vulnerability: "The greatest care must be taken to assure that [a minor's] confession was

voluntary, in the sense that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

More recently, in this Court's *per curiam* decision in *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843 (2003), where it held a 17-year-old's confession must be suppressed following an illegal arrest (absent undisclosed intervening evidence in the record) under the Fourth and Fourteenth Amendments, this Court applied earlier precedents in considering the defendant's status as a 17-year-old in its analysis:

> A *17-year-old boy* was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." .... [The boy's] 'Okay' in response to Pinkins's statement is no showing of consent under the circumstances. *Pinkins offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words 'we need to go and talk' presents no option but 'to go.'* There is no reason to think [the boy's] answer was anything more than 'a mere submission to a claim of lawful authority.'

538 U.S. at ____, 123 S. Ct. At 1846-47 (emphasis added)(citations omitted).

The Court's holdings in the above-cited cases that minors, in comparison with adults, are generally less mature, more submissive in the face of police authority, and lack critical knowledge and experience, presage the Ninth Circuit's conclusion that a reasonable juvenile in the circumstances in which Michael found himself might *not* have believed that he was free to leave the police station. The Court's findings also confirm that these developmental and situational differences, which are well documented in academic research, *see Part II infra,* are objectively knowable facts about adolescence and, therefore, appropriately considered when determining whether a youth was 'in custody' during interrogation.

This Court's more protective stance toward youth in confession cases parallels its distinctive view of children and adolescents in other settings. In the school environment, for example, this Court has repeatedly accorded youth a more restricted liberty interest in their persons and possessions under the Fourth Amendment. The Court has upheld the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law, *New Jersey v.T.L.O.*, 469 U.S. 325, 341-42 (1985); upheld random, suspicionless drug testing of student athletes, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995); and upheld random, suspicionless drug testing of students engaged in extracurricular activities, *Board of Ed. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 838 (2002).

In support of these rulings, the Court has noted, "[t]raditionally at common law, and still today, *unemancipated minors lack some of the most fundamental rights of self-determination* – including even the right of liberty in its narrow sense, *i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.*" *Vernonia,* 515 U.S. at 654 (emphasis added) (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, 467 U.S. 253, 265 (1984), in explaining the rejection of a constitutional challenge to the preventive detention of juveniles charged with delinquent acts, that *"juveniles, unlike adults, are always in some form of custody.* Children, by definition, are not assumed to have the capacity to care for themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae...*" (emphasis added) (citations omitted). *Cf. Vernonia,* 513 U.S. at 655 (when parents place their children in school they delegate custodial power to the

latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults); *T.L.O.*, 469 U.S. at 339 (same).

Decisions regarding constitutional provisions other than the Fourth and Fifth Amendments likewise demonstrate this Court's persistent view that children are simply different than adults under the Constitution. Thus, for example, this Court has emphasized the juvenile court's core principles of individualized rehabilitation and treatment, noting that youth, because they are still *malleable* and in development, are more amenable to such rehabilitative interventions than adults. *McKeiver v Pennsylvania*, 403 U.S. 528, 540 (1971); *Gault*, 387 U.S. 1, 15-16 (1967). *See also* Barry C. Feld, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court).[4]

Moreover, in a series of cases involving state restrictions on minors' abortion rights, this Court has also made legal distinctions between minors and adults, and found that "during the formative years of childhood and adolescence, *minors often lack . . . experience, perspective, and judgment*," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (emphasis added), as well as "the ability to make fully informed choices that take restrictions on minors' abortion rights, this Court has also made legal distinctions between minors and adults, and found that "during the formative years of childhood and adolescence, *minors often lack . . . experience, perspective, and judgment*," *Bellotti v.*

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[4] The Court's premises with respect to malleability finds ample support in the developmental literature. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court* in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9,23 (Thomas Grisso and Robert Schwartz eds., 2000) (noting that adolescence is a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment.") [hereinafter Steinberg and Schwartz, Developmental Psychology] .

Baird, 443 U.S. 622, 635 (1979) (emphasis added), as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences." *Id.* at 640; *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added). For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (noting that liberty interest of minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (noting that because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).[5]

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[5] The Court has held, however, that state legislatures may not enact statutes giving parents an absolute veto power over a minor's decision to obtain an abortion. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (invalidating state statute requiring that unmarried minors obtain parental consent for abortions). A state statutory scheme also must provide an alternative procedure which allows the juvenile to procure authorization for the abortion from the State without complying with the parental-notification and/or consent requirements, upon a showing that she is mature and informed enough to make the decision regarding the abortion independently from and without the consent of her parents. *Bellotti*, 443 U.S at 642-44. Alternatively, the court may find that the abortion is in the minor's best interest even if she is not able to make an independent decision. *Id.*

Thus, in the abortion context, the Court has drawn a distinction among the requirements that a state may impose on an immature versus a mature juvenile. As one commentator has observed, the Court has made this distinction because any interest the state has in protecting immature minors in the abortion context "is satisfied by their very maturity." *See* Catherine Grevers Schmidt, Note, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 635 (1993). *See also Bellotti* at 642 (striking down a parental veto statute to avoid the

Similarly, in *Parham v. J.R.*, 442 U.S. 584 (1979), this Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit children under the age of eighteen. In curtailing children's liberty interests in this context, the Court noted that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions...." *Id.* at 603.

This Court also has distinguished children from adults under the First Amendment. In *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), the Court upheld a state statute restricting the sale of obscene material to minors. Such a restriction was permissible for youth, as compared to adults, because *"a child – like someone in a captive audience – is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (footnotes omitted) (emphasis added). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state's right to restrict when a minor can work, on the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

In sum, in an unbroken line of decisions extending more than half a century, this Court has distinguished minors from adults under the law, noting that minors are, *inter alia*, (1) always in someone's custody and not at liberty to come and go at will; (2) less mature; (3) deficient in judgment and perspective; (4) more susceptible to the appearance or assertion of authority; (5) less able to think rationally in stressful situations; (6) less experienced and thus less knowledgeable; and (7) more malleable. Viewing Michael's claims against this historic backdrop, the Ninth Circuit correctly held that Michael's youth, lack of experience, and submission to parental authority were all part of the calculus to be undertaken by state courts in determining whether Michael was in custody, such that the detective was legally obligated to advise him of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966).

Moreover, under the facts of this case it is beyond argument that his age was not only objectively knowable to the detective who questioned him, it was considered by the detective in getting him to the police station in the first instance. The detective did not contact Michael directly; instead, the detective contacted Michael's parents (both at home and at his mother's place of employment) and told them that they needed to bring Michael to the police station for questioning. This was a clear acknowledgment that Michael was subject to the authority and control of the adults around him. In like form, at the conclusion of the interrogation, the detective did not tell Michael that he was free to go; instead, the detective told Michael that she would escort him back to his parents.

The facts of this case also demonstrate that it was an objectively knowable fact that Michael, as a minor, knew that he did not have the freedom to come and go at will. The detective denied Michael's request and his parents' request (in Michael's presence) to accompany Michael into the interview room. Michael's parents did not challenge the authority of the detective to exclude them from the interrogation and instead submitted to

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"grave and indelible" consequences of unwanted motherhood upon mature minors who are capable of rationally considering the alternatives).

Amici are not suggesting that police in interrogations engage in the same type of line drawing between mature and immature minors that courts undertake in the abortion context. Quite the contrary, *amici* contend that because these Court's findings, as confirmed by the development scholarship cited in Part II *infra*, are that *on average* adolescents are less mature than adults and lack critical experience, perspective and judgment, a *reasonable juvenile* will have a lower threshold for believing that he is in custody.

the detective's authority. Once Michael was separated from his parents, the detective never told Michael that he was free to leave or that he could speak to his parents at any time if he so desired. It was thus objectively knowable to the officer that a reasonable minor in Michael's position would have believed that, at that point in time, he was no longer in his parents' physical custody but rather in the detective's custody. *See also J.J.C.*, 689 N.E. 2d 1172, 1180 (Ill. App. Ct. 1998) ("when a juvenile's parents are present [at the police station], request to confer with their child, and are effectively refused by law enforcement authorities, the presumption arises that the juvenile's will is overborne.")

B. State statutes and case law routinely treat minors and adults differently based on age

The same developmental differences that have figured so prominently in this Court's jurisprudence are the basis for the many legal distinctions found in state laws concerning minors:

> [T]he experience of mankind, as well as the long history of our law, recognize[s] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J. dissenting) (emphasis in original). These legal distinctions cross a number of domains.

For example, following this Court's decisions in *Haley, Gallegos* and *Gault*, jurisdictions have implemented special protections for minors subject to interrogation by the police.

Many states impose additional obligations on law enforcement officials before interrogating a minor, including mandating that a juvenile's parent/guardian, legal custodian or attorney be present during questioning, or at the very least that the minor be given the opportunity to consult with a parent/guardian or attorney before waiving his rights. *See citations listed in Part III, infra.* Other courts equate a minor's request to contact a parent prior to or during interrogation as an invocation of the privilege against self-incrimination, such that police questioning must cease. *See People v. Burton*, 491 P.2d 793, 6 Cal. 375, 383-84 (Cal. 1971); *People v. Castro*, 462 N.Y.S.2d 369, 380-81 (1983). And in at least in one state, police must use a simplified version of Miranda warnings for juveniles. *State v. Benoit*, 490 A.2d 295, 304 (N.H. 1985).

State courts also have recognized the developmental differences between children and adults in contexts other than the justice system. Thus, courts have established the "infancy doctrine," which allows minors to avoid or disaffirm contracts in order to protect them, because minors are generally "immature in both mind and experience" and need to be protected from their own "bad judgment" as well as from adults who would take advantage of them. *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 290 (Wisc. 1968). *See also Halbam v. Lemke*, 298 N.W.2d 562, 567 (Wisc. 1980); *Statler v. Dodson*, 466 S.E.2d 497, 503 (W.Va. 1995); *Pankas v. Bell*, 198 A.2d 312, 315 (Pa. 1964).

In assessing negligence for the commission of torts, courts generally have held that the "reasonable person" test must be modified to consider the "objective standard of a reasonable person of like age, intelligence and experience under like circumstances." David Seildon, *Reasonable Expectations and Subjective Standards in Negligence Law: the Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17, 20 (1981); Speiser, Krause, Gans, AMERICAN LAW OF TORTS, Vol. 2, § 5:16 (1993); James Fleming, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO.

L. REV. 1, 16 (1951); *Ackerman v. Advance Petroleum Transport*, 7. N.W. 2d 235, 239 (Mich. 1942); *Frazier v. Northern Pac. Ry.*, 28 F. Supp. 20, 24 (Idaho 1939); *Alabama Power Co. v. Taylor*, 306 So. 2d 236, 250 (Ala. 1975); *Beekman Estate v. Midonick*, 252 N.Y.S.2d 885, 887 (N.Y. 1964); *Clark v. Circus-Circus, Inc.*, 525 F.2d 1328, 1331 (9th Cir. 1975); *DeLuca v. Bowden*, 329 N.E. 2d 109, 111 (Ohio 1975).

Accordingly, when teenagers are involved in dangerous activities courts have been careful to use the youth's age as a determining factor in assessing the reasonableness of their conduct. *See, e.g., Purtle v. Shelton*, 474 S.W.2d 123, 125 (Ark. 1971) (conduct of seventeen-year-old involved in gun accident assessed through a "reasonable child" standard); *Newman v. Crawford Construction Co.*, 799 S.W.2d 531, 532 (Ark. 1990) (holding fourteen-year-old to a child standard of care when conduct led to an injury on a construction site); *Goss v. Allen*, 360 A.2d 388, 391 (N.J. 1976) (providing that seventeen-year-old in skiing accident should be held to a standard of care appropriate for a minor because he had not yet reached the age of majority).[6]

Additionally, state legislatures have enacted laws establishing minimum ages for a wide range of life's activities, including marriage, driving, purchasing alcoholic beverages, and compulsory school attendance. See *State Age Requirements for Various Activities*, posted on Juvenile Law Center's website at www.jlc.org/agerequirements. (For the Court's reference, a copy of the website listing also is attached at Appendix B.)

Courts also have upheld legislative restrictions on minors' liberty in the form of juvenile curfews. Generally,

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[6] The operation of motor vehicles, because it has been deemed to be an adult activity, is the one general exception to the "reasonable minor" test. *See, e.g., Wagner v. Shanks*, 194 A.2d 701 (Del. 1963) (minor driving a car); *Goodfellow v. Coggbern*, 560 P.2d 873 (Idaho 1977) (adolescent in tractor accident); *McIntyre v. McIntyre*, 588 S.W.2d 836 (Tenn. 1977) (minor driving motorcycle).

juvenile curfews have been upheld based upon the findings of this Court that juveniles are not free to come and go at will and, instead, are always in someone's custody. *See note 16 infra.* And as described further in *Part III infra*, enforcement of teen curfews is among the array of police activities that require officers to routinely determine whether an individual is a minor and to take special actions that would be inapplicable to adults in like circumstances.

II. SCHOLARLY RESEARCH SUPPORTS THE NINTH CIRCUIT'S HOLDING THAT MICHAEL'S JUVENILE STATUS MUST BE CONSIDERED IN DETERMINING WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, A REASONABLE PERSON IN MICHAEL'S POSITION WOULD HAVE FELT FREE TO TERMINATE THE INTERVIEW AND LEAVE THE INTERROGATION ROOM

The Ninth Circuit's holding, that Michael's juvenile status was relevant to the determination of whether a reasonable person in his position would have felt free to terminate the interrogation, is consistent with settled research that children and adolescents are developmentally distinct from adults in critical areas pertinent to this inquiry.

Developmental psychologists have long recognized that adolescence is a period of major development across many domains, including the realm of cognition. During the teenage years, youth begin to develop the abilities to abstract, to think of the possible (including alternative possibilities) and not just the real, and to form and test hypotheses about the world around them. Stanley I. Greenspan & John F. Curry, *Extending Piaget's Approach to Intellectual Functioning*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 402, 406-07 (Harold I. Kaplan & Benjamin J. Sadock eds., 7th ed. 2000) (providing an overview of Jean Piaget's cognitive development model, which remains an important theoretical work in the child development field).[7] These cognitive capacities progressively

[7] *See also* KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT 7 (L. Rosado ed., 2000) [hereinafter KIDS ARE DIFFERENT]; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY

become part of an adolescent's repertoire; however, this development rarely follows a straight line during adolescence, as periods of progress alternate with periods of regression. Steinberg & Schwartz, *Developmental Psychology* at 24.

Developmental psychologists also recognize that adolescents do not utilize these developing cognitive capacities consistently over time or across a variety of situations. Other non-cognitive, "psychosocial factors," including the external environment, impact adolescent perceptions, judgment and decision-making and limit their capacity for autonomous choice. Elizabeth Cauffman and Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 327-29 (Thomas Grisso & Robert G. Schwartz eds., 2000).[8] As one developmental psychologist has observed, "During the time these processes are developing, it doesn't make sense to ask the average adolescent to think or act like the average adult, because he or she can't – any more than a six-year-old child can learn calculus." Laurence Steinberg, *Juveniles on Trial*, 18 CRIM. JUST. 20, 22 (Fall 2003). These psychosocial factors, described in more detail below, explain why a reasonable juvenile will have a lower threshold for believing that she is in custody as compared to a reasonable adult. Specifically, they confirm why

137, 157 (1997) [hereinafter Scott & Grisso, *The Evolution of Adolescence*]; R. Murray Thomas, COMPARING THEORIES OF CHILD DEVELOPMENT 273-318 (3d ed. 1992); Committee on Child Psychiatry, Group for the Advancement of Psychiatry, *How Old is Old Enough? The Ages of Rights and Responsibilities* 20-35 (1989) [hereinafter *GAP*].

[8] *See also* KIDS ARE DIFFERENT at 8-10; Scott & Grisso, *The Evolution of Adolescence* at 157, 161-64; Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*); Elizabeth S. Scott *et al.*, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 222-23 (1995) [hereinafter Scott, *Evaluating Adolescent Decision Making]; GAP* at 28 .

a reasonable juvenile in Michael's shoes would have concluded that he was not free to leave the interrogation room at the police station.

To begin, adolescents have a different perception of time as compared to adults. Adolescents exhibit present-oriented thinking and have difficulty thinking beyond the present. Generally, they seem unable to think about the future or they discount it. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 17 (Summer 1999) [hereinafter Beyer, *Recognizing the Child*].[9] Another aspect of adolescent thinking is egocentrism, which is an intense self-consciousness that leads teenagers to believe that others are constantly watching and evaluating them. David Elkind, *Egocentrism in Adolescence*, 38 CHILD. DEV. 1025, 1029-30 (1967); KIDS ARE DIFFERENT at 9. Egocentrism interacts with an adolescent's present-oriented thinking to lead an adolescent to only see the difficult circumstances which s/he is currently facing and not see beyond into the future. KIDS ARE DIFFERENT at 9. Consequently, a reasonable youth in Michael's shoes, who was interrogated in the absence of a parent in a police station for 2 ½ hours, would have difficulty seeing past the time that he was confined to the interview room and being questioned by police, to a point in time when he would be free to leave. A reasonable juvenile would likely feel the scrutiny of the police officers more intensely than an adult.

Moreover, it cannot be emphasized enough that the utilization of cognitive skills is context-specific during adolescence. Kurt W. Fischer *et al.*, *The Development of Abstractions in Adolescence and Adulthood*, in BEYOND FORMAL OPERATIONS: LATE ADOLESCENT AND ADULT COGNITIVE DEVELOPMENT 43, 57 (Michael L. Commons *et al.* eds., 1984); *GAP* at 34. For example, stress and fear greatly

[9] *See also* KIDS ARE DIFFERENT at 9; Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 591-92 (2000); Scott & Grisso, *The Evolution of Adolescence* at 164.

impact adolescent cognition; in stressful situations, adolescents often will not use the highest level of cognitive reasoning of which they may be capable in non-stressful scenarios. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 27 (Summer 2000) [hereinafter Beyer, *Immaturity*]; *Kids are Different* at 10; Fischer at 70. Youth simply have less experience, including interpersonal experience, to draw on than adults, and so on average they have a lesser capacity to respond and react in new and stressful situations. Steinberg & Schwartz, *Developmental Psychology* at 26.[10] Adolescents also generally process information less effectively than adults and instead exhibit "either-or" thinking, again particularly when under stress. Adolescents will typically perceive only one option when adults in similar situations would see multiple possibilities. Beyer, *Immaturity* at 27; Beyer, *Recognizing the Child* at 17-18.

This tendency to engage in either-or thinking also affects adolescents' interactions with others. An important developmental "task" of adolescence is "negotiating about power and control in the context of changing relationships with peers and parents." Scott, *Evaluating Adolescent Decision Making* at 230 (citations omitted). But in the process of forming more complex relationships with adults, adolescents regress; teenagers will "polarize" their characterization of adults, or overgeneralize or stereotype a trait in a particular person, instead of seeing people as having mixed motives or agendas. Peter Blos, THE ADOLESCENT PASSAGE: DEVELOPMENTAL ISSUES 152, 156 (1979); Howard Lerner, *Psychodynamic Models* in HANDBOOK OF ADOLESCENT PSYCHOLOGY 53, 66 (Vincent B. Van Hasselt & Michel Hersen eds., 1987) (citation omitted); Robert L. Selman, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL ANALYSES

[10] *See also* Scott & Grisso, *The Evolution of Adolescence* at 164; Scott, *Evaluating Adolescent Decision Making* at 224-27; *GAP* at 30.

134 (1980). Thus, a teenager confined to an interrogation room by a police officer who denied both his and his parents' requests that his parents accompany him during the interview would likely view that officer in "polarized terms," i.e., as an authority figure who controls his movements. The teenager would be less likely to consider that the officer may *not* have the authority to hold him or has other motives for questioning that are not adverse to the minor's interests. In this stressful situation and given a lack of experience, a youth is more likely to see only one option – remaining in the interrogation room until he tells the officer the information the officer is seeking – instead of conceiving of other possibilities, i.e., that he can leave without the officer's permission.

Scholarship on moral development in adolescence also explains why a juvenile would be more inclined than an adult to acquiesce to a police officer's demands. Adolescence is marked by "conventional morality" – "conforming to and upholding the rules and expectations and conventions of society or authority just because they are society's rules, expectations, or conventions." Lawrence Kohlberg, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES 172-73 (1984). Most people who reach the "postconventional level of morality" – where they grapple with the moral principles underlying these rules before deciding to accept them as their own values – only do so in their twenties. *Id.* at 172-73. The conformity characteristic of adolescence means that teenagers in general are more compliant when confronted by authority figures. Thus, juveniles in Michael's situation are more likely to comply with the officer's demands that he tell a specific story. Adolescence is a time when the gradual transition to becoming a self-governing, autonomous individual begins. KIDS ARE DIFFERENT at 16. But adolescents remain emotionally dependent on other people, specifically their parents and peers, throughout this development process; they are thus less capable of independent, self-directed action than adults who have achieved a greater sense of identity and autonomy.

They are vulnerable to influences from both peers and parents. *Id.* at 16-17.[11]

Finally, new research into the structure and function of the teenage brain also suggests that immature brain development among adolescents may disadvantage them in the interrogation room setting. This research, made possible by new technologies such as magnetic resonance imaging (MRI) that allow scientists to study images of the brain, suggest that the teenage brain does not fully develop until the early 20's. Most importantly, the research suggests that the last areas of the brain to develop are the frontal lobes, specifically the pre-frontal cortex, which govern decision-making, judgment, and impulse control. As this area of the brain develops, young adults become more reflective and deliberate decision makers, the very skills which they would need in confronting and dealing with sophisticated police interrogators. *See* David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14.1 STAN. L. & POL'Y REV. 13, 15 (2003) (citing NAT'L RES. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 16 (Joan McCord *et al.* eds., 2001)); Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003) (citing Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417, 421-23 (2000)); National Institute of Mental Health, *Teenage Brain: A Work in Progress* (NIH Publication No. 01-4929, January 2001) (available at http://www.nimh.nih.gov/publicat/teenbrain.pdf). *See also In re Stanford*, 537 U.S. 968, __, 123 S.Ct. 472, 474 (2002) (Stevens, J., dissenting) (noting that "[n]euroscientific evidence of the last

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[11] *See also* Laurence Steinberg *et al.*, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEVELOPMENT 841, 848 (1986); Steinberg & Schwartz, *Developmental Psychology* at 23 (noting that adolescence is a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment.")

few years has revealed that adolescent brains are not fully developed" and "use of magnetic resonance imaging – MRI scans – have provided valuable data that serve to make the case even stronger that adolescents are more vulnerable, more impulsive, and less self-disciplined than adults") (internal quotations omitted) (citations omitted). Although this research is in its infancy, early work does suggest a link between age and decision making, such that a reasonable seventeen-year-old would be less able than a reasonable adult to withstand the pressures of the interrogation setting.[12]

This psychological and neurological research must inform this Court's examination of the specific circumstances of Michael's interrogation. Michael was taken to the police station by his parents after they were contacted by the police. Michael's parents never questioned whether they could decline the detective's request that they bring Michael to the station. The detective denied Michael's and his parents' requests (in Michael's presence) to accompany Michael into the interview room. Michael's parents did not challenge the authority of the police officer to exclude them from the interrogation and instead submitted to the detective's authority. Michael's beliefs about his situation were reasonably shaped by his parents' own submission to police authority. The circumstances surrounding Michael's interrogation, when viewed in the context of the developmental deficits of youth, had a major impact on Michael's reasonable belief that he could not make an autonomous choice, refuse to be interrogated and leave the police station.

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[12] Another study of the teenage brain suggests that until the frontal lobes mature, teenagers may be less able to process emotions that adults. A.A. Baird, S.A. Gruber et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AMER. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 195, 195-99 (1999).

III. FEDERAL, STATE AND LOCAL LAWS ALREADY REQUIRE POLICE TO DETERMINE AN INDIVIDUAL'S AGE AND TAKE SPECIFIC ACTIONS UPON LEARNING THAT THE INDIVIDUAL IS UNDER 18; REQUIRING POLICE OFFICERS TO STEP INTO THE SHOES OF A REASONABLE JUVENILE TO ASSESS WHETHER A YOUTH IS IN CUSTODY PLACES NO ADDITIONAL BURDEN ON LAW ENFORCEMENT

Petitioner urges this Court to renounce the reasonable juvenile test for determining custody, arguing, *inter alia*, that the test places an additional burden on law enforcement. This argument is without merit. As described *infra*, pursuant to federal and state laws, and local ordinances, law enforcement officials must routinely determine the age of a suspect and/or a person they are taking into custody and then take certain actions upon learning that the person in question is a minor. Since this determination is already a routine part of law enforcement activities, no additional burden is created by affirming the Ninth Circuit's proper application of the reasonable juvenile test.

Thus, for example, jurisdictions that receive federal monies pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974 (codified as amended at 42 U.S.C. § 5601 *et seq.*)[13] must ensure that law enforcement officers comply with certain requirements with respect to minors in custody.

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[13] The U.S. Department of Justice reported that in 2001, 48 states, the District of Columbia, and certain territories were either completely or substantially in compliance with this requirement and, thus, were eligible for JJDPA funding in fiscal 2003. *See* Office of Juvenile Justice and Delinquency Prevention, *2001 Compliance Monitoring Summary: Summary of State Compliance with the Juvenile Justice and Delinquency Prevention Act of 1974* (Washington, D.C., December 8, 2003).

Specifically, federal regulations mandate that officers can only keep juveniles in an adult jail or lockup – while maintaining sight and sound separation from adult offenders – for up to six hours from the time they are taken into custody. 28 C.F.R. § 31.303(e) (2) and (3). To comply with this federal mandate, law enforcement officials must routinely determine whether an individual is a minor upon taking that individual into custody. Currently, 48 states, the District of Columbia and certain territories are implementing this mandate. *See n. 12 supra.*

Police officers must make the same initial determination of an individual's "youth status" in those states that require them to promptly notify a minor's parent/ guardian or legal custodian as to the minor's location upon taking the minor into custody.[14]

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[14] *See, e.g.*, DEL. CODE ANN. tit. 10 § 1004 (officer taking child into custody shall immediately notify); FLA. STAT. ANN. § 985.207(2) (person taking child into custody shall attempt to notify); HAW. REV. STAT. § 571-31 (when juvenile taken into custody, officers must immediately notify); 705 ILL. COMP. STAT. 405/5-405 (when minor arrested, law enforcement "shall immediately make a reasonable attempt" to notify); ME. REV. STAT. ANN. tit. 15 § 3203-A(2) (police officers shall notify "without unnecessary delay" when minor is arrested); MISS. CODE ANN. § 43-21-303(3) (immediately release or continue reasonable efforts to notify); MONT. CODE ANN. § 41-5-331 (when youth taken into custody for questioning, must be immediately notified); N.Y. CRIM. PROC. LAW § 140.20 (officers shall immediately notify when juvenile arrested); N.Y. FAM. CT. LAW § 305.2(3) (same); S.C. CODE § 20-7-7205 (officer taking child into custody shall notify as soon as possible); S.D. CODIFIED LAWS § 26-7A-15 (officer taking child into custody "shall immediately, without unnecessary delay in keeping with the circumstances" notify); TENN. CODE ANN. § 37-1-115 (person taking child into custody shall within a reasonable time either notify or release the child to his parent/guardian or legal custodian); TEX. FAM. CODE ANN. § 52.02 (person taking child into custody shall "promptly" notify); UTAH CODE ANN. § 78-3A-113 (officer taking minor into custody, shall notify "without unnecessary delay"); W.VA. CODE § 49-5-8 (officers must immediately notify when juvenile taken into custody); WIS. STAT. § 938.19(2) (person taking juvenile into custody shall "immediately attempt to notify" and continue to attempt to notify by the most practicable means until either parent/guardian or legal custodian

Similarly, a number of states require law enforcement officials to take certain steps before interrogating a minor. Specifically, these states mandate that a juvenile's parent/guardian, legal custodian or attorney be present during questioning, or at the very least that the minor be given the opportunity to consult with a parent/guardian or attorney before waiving his rights.[15]

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contacted or juvenile brought to intake worker; when latter, intake worker shall continue attempts until successful notification); WYO. STAT. ANN. § 14-6-206 (any person taking a child into custody shall notify "as soon as possible"). *See also* 18 U.S.C. § 5033 (federal requirement that law enforcement officers who take juvenile into custody immediately notify juvenile's parents, guardian or custodian and "immediately advise such juvenile of his legal rights, in language comprehensive to juvenile").

[15] *See, e.g.*, COLO. REV. STAT. § 19-2-511 (statements by a juvenile resulting from custodial interrogation are inadmissible unless parent/guardian or legal or physical custodian was present at the interrogation and both were advised of the juvenile's rights and both waived the rights in writing; if parent/guardian or custodian not present, statements may be admissible if attorney present); 705 ILL. COMP. STAT. 405/5-170 (minor under 13 must be represented by counsel during entire custodial interrogation); IND. CODE § 31-32-5-1 (rights guaranteed to child can be waived by (1) counsel for child if child knowingly and voluntarily joins the waiver; (2) child's parent/guardian or custodian if that person knowingly and voluntarily waives, has no adverse interest, meaningful consultation has occurred between that person and child, and child knowingly and voluntarily joins in waiver; or (3) emancipated child); IOWA CODE § 232.11 (child less than 16 years of age cannot waive right to be represented by counsel in custodial interrogation the written consent of the child's parent, guardian or custodian; waiver by child 16 years of age and older is only valid if good faith effort made to notify parent/guardian or custodian of child's location, alleged act, and right to visit and confer with child); *In the Matter of B.M.B.*, 955 P.2d 1302, 1312-1313 (Kansas 1998) (juvenile under 14 must be given opportunity to consult with parent/guardian or attorney before waiving rights to an attorney and against self-incrimination; both parent/guardian and juvenile shall be advised of these rights); *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) (holding that waiver of Miranda rights by juvenile under 14 is not effective without showing that parent or interest adult was present.

understood the warnings, and had opportunity to explain rights to juvenile; for youth 14 and over, for waiver to be valid without consultation, "the circumstances should demonstrate a high degree of intelligence, experience, knowledge or sophistication on the part of the juvenile"); ME. REV. STAT. ANN. tit. 15 § 3203-A(2-A) (when juvenile is arrested, officer may not question juvenile until either: legal custodian is present during questioning; legal custodian gives consent for questioning in his/her absence; or after reasonable effort, officer cannot contact custodian and officer seeks to question juvenile about continuing or imminent criminal activity); MISS. CODE ANN. § 43-21-303(3) (person taking child into custody shall make continuing reasonable efforts to notify and invite them to be present during questioning), *see also M.A.C. v. Harrison County Family Court*, 566 So.2d 472, 475 (Miss. 1990) (holding that parent has statutory right to be present during interrogation of child); MONT. CODE ANN. § 41-5-331 (youth under 16 years of age may waive rights if youth and youth's parents agree to waiver, or, if youth and parents do not agree, youth made waiver with advice of counsel); *In the Interest of J.F.*, 668 A.2d 426, 430 (N.J. 1995) (holding that police may interrogate a juvenile without a parent/guardian present "only if juvenile has withheld their names and addresses, a good faith effort to locate them is unsuccessful, or they simply refuse to attend the interrogation"); N.Y. FAM. CT. LAW § 305.2(7) (minor under 16 who is in custody for alleged delinquency offense shall not be questioned unless minor and parent or other person legally responsible for minor are advised of minor's rights); N.C. GEN. STAT. § 7B-2101 (when juvenile is under 14, no in-custody statement shall be admitted into evidence unless made in presence of juvenile's parent/guardian or custodian, or juvenile's attorney; if attorney is not present, parent may not waive any rights on behalf of juvenile); OKLA. STAT. tit. 10, § 7303-3.1 (no information gained by a custodial interrogation of a child under sixteen years of age is admissible unless the interrogation is done in the presence of the parents, guardian, attorney, adult relative, adult caretaker, or legal custodian of the child and, if no attorney is present, only after both child and adult have been fully advised of the rights of the child); TEX. FAM. CODE ANN. § 51.09 (child can only waive rights if waiver made in writing by attorney and child); *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982) (before juvenile can waive rights, he must be given opportunity to consult with an adult (i.e. parent, legal guardian or attorney) who is completely disassociated from the prosecution and is informed of the juvenile's rights); W.VA. CODE § 49-5-2(k)(1) (statements made by juvenile 14 or 15 years of age while in custody are not admissible unless made in the presence of the juvenile's counsel, or in the presence of

In addition to the requirements set forth in these state and federal laws, the leading police interrogation manual, Fred E. Inbau, John E. Reid *et al.*, CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001) [hereinafter Inbau, Reid], also specifically instructs police on how to deal with youthful suspects and their parents. For example, Inbau, Reid teaches that some states have parental presence requirements, and advises officers specifically on how to deal with "over-protective parents." *Id.* at 300-01. The manual also teaches officers to marginalize parents by advising officers to tell parents to refrain from talking, and to proceed with the interrogation as if the parents were not there. *Id.* at 300-301. Finally, Inbau, Reid counsels law enforcement to use specific psychological "themes" with youthful offenders, such as placing blame for the suspect's actions on their family (if the parent is not present), their neighborhood, or peers, and suggesting that the youth should "embark upon restraint and corrective action before serious consequences develop." *Id.* at 298-300. These recommended specialized tactics for interrogating youthful suspects suggest not only that law enforcement must ascertain the age of the person they are questioning, but that they actually take advantage of the suspect's youth during questioning.

Outside of the station, police officers must routinely inquire whether an individual on the street is a minor in those jurisdictions with juvenile curfews. In the 1990s, "legislatures enacted more than one thousand new juvenile curfew laws and governments revived existing curfew laws that had long been dormant." Deidre E. Norton, *Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 175, 175 (2000-

and with the consent of the juvenile's parent or custodian after the parent/custodian has been fully advised of juvenile's rights; statements made by youth under age 14 are not admissible unless made in the presence of youth's counsel).

2001) (citation omitted). According to a 1995 study of the seventy-seven most populous cities in the United States, 77% of them impose juvenile curfews. Norton at 177 (citing William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347, 353 (1995)). And since 1995, at least nine more of the most populous cities have enacted curfews, bringing the percentage up to 88%. Norton at 177 & n. 10 (citing Ruefle & Reynolds at 353). *See also* U.S. Conference of Mayors, *A Status Report on Youth Curfews in America's Cities: A 347-City Survey* 1 (1997) (www.usmayors.org/uscm/news/publications/curfew.htm) (stating that 70% of the 272 cities surveyed had youth curfews in 1995) [hereinafter Mayors' Conference]. The rationales behind passing youth curfews include reducing delinquent and criminal behavior as well as victimization of youth, and for the daytime curfews, increasing school attendance through enforcement of the jurisdiction's truancy laws. Mayors' Conference at 2-6.[16]

These curfews set specific times of day – both at night and during the day – when minors are not allowed to be on the streets alone. Consequently, police officers on patrol must regularly ascertain whether individuals they encounter on the street during curfew hours are minors. And if police do identify a minor on the street after curfew, officers must then take specific actions that would be inapplicable to an adult, i.e., likely

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[16] In upholding the constitutionality of juvenile curfews, courts have again relied on this Court's findings that minors' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)), and that juveniles lack the fundamental right in free movement. *Hutchins v. District of Columbia*, 188 F.3d 531, 538-39 (D.C. Cir. 1999) (en banc) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654 and *Schall*, 467 U.S. at 265) and *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654).

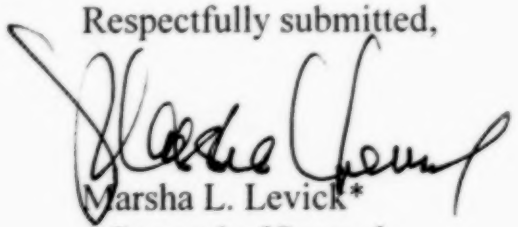
issue some type of citation, and either take the minor home, back to school, or to the police station if they cannot locate a responsible adult. *See, e.g., Hutchins v. District of Columbia*, 188 F.3d 531, 534-35 (D.C. Cir. 1999) (en banc) (describing curfew law and procedures in Washington, D.C.); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 856-58 (4th Cir. 1998) (same for Charlottesville, Virginia); *Qutb v. Strauss*, 11 F.3d 488, 496- 499 (5th Cir. 1993) (same for Dallas, Texas).

Given the myriad of federal, state and local laws, as well as police training literature, that already require or encourage police to determine the age of individuals they come into contact with, it can hardly be deemed an additional burden for law enforcement to ascertain a person's age when interviewing or interrogating them. This argument is especially specious with regard to minors interrogated at police stations, where law enforcement is under *federal mandate* to know whether the individual is a juvenile.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center *et al.*, respectfully request that the judgment of the U.S. Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,



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APPENDIX A

IDENTITY OF *AMICI CURIAE*

Organizations

Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise

second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

Founded in 1997, the **Juvenile Justice Project of Louisiana** (JJPL) has established itself as a partner in efforts to reform Louisiana's juvenile justice system. We have dedicated ourselves to advocating not only for more effective, less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile and criminal justice systems. JJPL was founded on the recognition that children and adolescents are fundamentally different from adults and, as such, require developmentally appropriate interventions and advocacy. The manner in which the judicial system responds to young people in crisis has been a central focus of JJPL. We believe that children must be afforded essential due process protections and that such protections necessarily include a consideration of their developmental capacities and limitations. This is particularly the case where a child is likely to feel intimidated by authority figures. Given the ways in which young people are especially susceptible to police questioning and interrogations, a juvenile must have meaningful access to counsel to ensure his rights are protected. JJPL is committed to ensuring that children and youth accused of wrongdoing receive the appropriate protections of the law.

Legal Services for Children (LSC) was founded in 1975 as the first non-profit law firm established to provide free direct legal and social services to children and youth. LSC represents youth in dependency, guardianship, school expulsion, immigration and other cases. LSC uses attorney-social worker teams to assist at-risk youth in the Bay Area who need to access the legal system to stabilize or improve their lives. LSC's mission is to empower youth by increasing their active participation in making decisions about their own lives. LSC works directly with youth involved in, or at risk of involvement

in the juvenile justice system. LSC is also the host organization for the Pacific Juvenile Defender Center. The Defender Center provides support, training and technical assistance for juvenile defenders throughout California and Hawaii. It is the mission of the Defender Center to improve the quality of juvenile defense in our region and ensure that juveniles are provided with holistic representation that meets their needs.

The **Mexican American Legal Defense and Educational Fund** (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos and Latinas living in the United States. During the last several years, MALDEF's work in the area of criminal justice has been expanding. Within our criminal justice work, a goal of our organization is to protect the constitutional rights of Latino and Latina youth who come into contact with the criminal and juvenile justice systems.

The **National Council of La Raza** (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. Over the past four years, NCLR has focused its civil rights policy portfolio to include juvenile and criminal justice issues affecting the Latino community. NCLR joins this brief to support the Constitutional rights of Latino youth who come into contact with the criminal and juvenile justice systems, as well as with state and federal law enforcement officials.

The **Public Defender Service for the District of Columbia** (PDS) represents numerous juvenile clients in the District of Columbia who will be affected by this case. In our experience, child clients are much more likely than adults to view themselves in custody and to give false confessions in order to please or influence adult authority figures. We have observed that, because our juvenile clients are continuously "in the custody" of an adult authority, be it a parent, guardian, or other legal custodian, they lack the freedom and autonomy of most adults and tend to assume that they "must" speak in situations where a reasonable adult client would not. In fact, in many situations in which the "reasonable" adult is free to walk away, it would be "unreasonable" for children to have the same expectation and sense of freedom. We believe it is important for the Court to have the benefit of our real world observations as it considers the important issues presented by this case, especially because we believe that the unique circumstances of the custodial interrogation of children result in wrongful convictions of juvenile clients.

The **San Francisco Public Defender's Office** provides legal representation per year to approximately 1,400 juveniles, aged 10 -18 who are arrested and charged with delinquent offenses. The majority of the juvenile clients represented by the office come from difficult family circumstances and live in dangerous and poverty stricken neighborhoods and are in need of legal and social services. Our juvenile clients are a very vulnerable population with needs that are substantial and involve multi-systems collaborations such as with special education, mental health, dependency and immigration. The goal of the juvenile justice system is very different from the adult system. We recognize the need to treat children going through adolescence very differently than adults. We, therefore, support the *amicus* brief on behalf of the respondent in this case.

The **Southern Center for Human Rights** is a non-profit, public interest legal program governed by a Board of Directors. Among its missions are protection of the constitutional rights of children and adults accused of crimes, achieving equal justice, and ensuring that the criminal justice system operates consistently with the requirements of the Bill of Rights. The Center is particularly interested in law enforcement practices as they relate to children and others who may not have the same maturity and judgment as others in dealing with law enforcement officers.

The **Youth Law Center** (YLC) is a national public interest law firm with offices in San Francisco and Washington, D.C., that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, protection of due process rights of youth at risk, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system. YLC is particularly interested in adolescent development issues, having worked on such issues for 25 years, including helping to develop a comprehensive training curriculum on adolescent development for juvenile court personnel with the support of the John D. and Catherine T. MacArthur Foundation.

Individuals

Professor Marie Banich received her Ph.D. from the University of Chicago in 1985. She is a professor in the Department of Psychology at the University of Colorado at Boulder and in the Department of Psychiatry, at the University of Colorado Health Sciences Center, in Denver. Her fields of professional interest are cognitive neuroscience and human neuropsychology. She is currently examining decision-making processes of adolescents and adults.

Professor Jeffrey Fagan is a Professor of Law and Public Health at Columbia University. He is also a member of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Professor Fagan is currently conducting research on several dimensions of juvenile law and juvenile justice, including the competence and culpability of adolescents facing transfer to the criminal court. He is also conducting research on the death penalty for persons who commit capital offenses before their 18th birthday; this research suggests that the developmental limitations of adolescents may compromise their capacity for full participation in legal proceedings when punishment is at stake, whether in criminal or juvenile court. Professor Fagan has conducted research on capital punishment, and his research has shown that false confessions are often a cause of wrongful conviction and reversible error. Accordingly, he agrees to sign this *amicus* brief to assist in defining standards and procedures for assessing the competence of adolescents facing legal proceedings and the possibility of punishment.

Professor Barry Feld is a Centennial Professor of Law at the University of Minnesota Law School. He has done extensive research on many aspects of juvenile justice and has taught about the field for three decades. His publications have included eight books and more than 60 articles on juvenile

justice procedure and administration. Professor Feld has written extensively about adolescent development and juveniles' competence and capacity to waive their legal rights, both to waive their Miranda rights and their right to counsel.

Professor Martin Guggenheim of the New York University School of Law (NYU) is among the nation's pre-eminent scholars, teachers and practitioners in the area of children's law. At NYU, he is Executive Director of Washington Square Legal Services (NYU's free legal services program), and Supervising Attorney of NYU's Family Defense Clinic, which seeks to protect vulnerable families from unwarranted governmental intrusion. He directed NYU's Juvenile Rights Clinic for fifteen years, and currently teaches a seminar entitled Child, Parent & State that explores such issues as the rights of young people and the bases for according young people rights that adults have under the Constitution. As a *pro bono* advocate for children, Professor Guggenheim has litigated innumerable cases in the state and federal courts, and served as chief counsel for the following three cases in the United States Supreme Court: *Schall v. Martin*, 467 U.S. 253 (1984), *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), and *Santosky v. Kramer*, 455 U.S. 745 (1982). Professor Guggenheim serves on numerous national and regional boards of directors and advisors for organizations and projects involving children.

Professor Randy Hertz of the New York University School of Law (NYU) is also among the country's leading scholars and teachers in the area of children and the law. He is the Director of Clinical Programs at NYU, as well as Supervising Attorney of NYU's Juvenile Rights Clinic, and the Editor-In-Chief of the Clinical Law Review, a national, peer-reviewed scholarly journal. Professor Hertz is a current or former member of numerous professional organizations

aimed at improving the administration of justice for children. He has published many books and articles on subjects including the legal needs of young people. He is the 2000 recipient of the American Bar Association's Livingston Hall Award for Juvenile Justice Advocacy.

Professor Paul Holland, a clinical assistant Professor of Law at the University of Michigan Law School, has represented youth charged with crimes for over ten years, in Washington, D.C., Illinois, and Michigan. He served as Deputy Director of the Juvenile Justice Clinic at Georgetown University Law Center for five years. He also served as a member of the Illinois Sub-Cabinet for Children and Families. He is presently the Michigan representative to the Board of the Midwest Region Juvenile Defender Center.

The Honorable David B. Mitchell is retired from the Circuit Court for Baltimore City, having served 18 years as a judge of this court of general jurisdiction. His duties, in addition to those generally associated with a judge at that level of court, included being the presiding and administrative judge of the juvenile and later the criminal divisions of that court. He also was chairman for many years of the Juvenile and Family Law Committee of the Maryland Judicial Conference. He adheres to the *amicus* brief in his individual capacity as a retired judge.

Professor Wallace Mlyniec is the Associate Dean of Clinical Education and Public Service Programs, Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in family law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families.

Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University.

Professor Edward P. Mulvey is a Professor of Psychiatry and Director of the Law and Psychiatry Program at Western Psychiatric Institute and Clinic at the University of Pittsburgh School of Medicine. He received his B.A. in psychology from Yale University in 1973, and his Ph.D. in Community/Clinical Psychology from the University of Virginia in 1982. Dr. Mulvey is a Fellow of both the American Psychological Association and the American Psychological Society, a recipient of a Faculty Scholar's Award from the William T. Grant Foundation, a member of two MacArthur Foundation Research Networks (one on Mental Health and the Law and another on Adolescent Development and Juvenile Justice), and a member of the steering committee for the National Science Foundation-funded National Consortium on Violence Research.

Professor Catherine J. Ross, Ph.D., J. D., George Washington University Law School, specializes in legal issues concerning children and families and the relationships between children, their parents and the state. She has written and lectured extensively on topics including children's need for parental advice in the juvenile justice system in order to realize meaningful rights under the Fifth and Sixth Amendments.

Professor Elizabeth Scott, currently a visiting Professor of Law at Columbia Law School, is class of 1962 Professor of Law at the University of Virginia School of Law. Her research and scholarship is in the area of juvenile justice

and delinquency. In addition to the articles cited in this brief, recent articles include *Less Guilty by Reason of Adolescence* in the December 2003 AMERICAN PSYCHOLOGIST with Laurence Steinberg.

Annie Steinberg, M.D., Associate Professor of Pediatrics and Child Psychiatry at the University of Pennsylvania Medical School and The Children's Hospital of Philadelphia, and **Alan M. Lerner**, Esquire, Practice Professor of Law, University of Pennsylvania Law School, are two of the five co-directors of the Field Center for Children's Policy, Practice, and Research, an interdisciplinary center of the University of Pennsylvania Schools of Law, Medicine, and Social Work, and The Children's Hospital of Philadelphia. The Field Center is a child-centered, interdisciplinary, vertical, team-based center whose mission is the pursuit of innovative solutions to the crisis facing America's children. Dr. Steinberg's practice, both within and without the Field Center, focuses on children, many of whom come into contact with the juvenile court system. Professor Lerner directs the Law School's Child Advocacy Clinic, which acts as child advocates and guardian ad litems for children in the child welfare system in Philadelphia.

Professor Laurence Steinberg, Distinguished Professor of Psychology at Temple University, directs the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Professor Steinberg is a developmental psychologist specializing in adolescence. His current research examines adolescents' competence to stand trial, the predictors and correlates of serious juvenile offending, and the development of psychological capacities likely to influence criminal responsibility. He is a former President of the Society for Research on Adolescence.

APPENDIX B

State Age Requirements for Various Activities
Reproduced from the Juvenile Law Center website
www.jlc.org/agerequirements

Marriage

Unless minors meet certain statutorily-created exceptions, the majority of states require both parties to a marriage to be eighteen years of age or older. These are Alaska, ALASKA STAT. § 25.05.171; Arizona, ARIZ. REV. STAT. § 25-102; Arkansas, ARK. CODE ANN. § 9-11-102; California, CAL. FAM. CODE § 301; Colorado, COLO. REV. STAT. § 14-2-106; Connecticut, CONN. GEN. STAT. § 46b-30; Florida, FLA. STAT. ANN. § 741.0405; Hawaii, HAW. REV. STAT. § 572-2; Idaho, IDAHO CODE § 32-202; Illinois, 750 ILL. COMP. STAT. 5/203; Indiana, IND. CODE § 31-11-1-4; Iowa, IOWA CODE § 595.2; Kansas, KAN. STAT. ANN. § 23-106; Kentucky, KY. REV. STAT. ANN. § 402.020; Louisiana, LA. CHILDREN'S CODE ANN. art. 1545; Maine, ME. REV. STAT. ANN. tit. 19-A, § 652; Maryland, MD. CODE. ANN., FAM. LAW § 2-301; Massachusetts, MASS. GEN. LAWS ch. 207, § 7; Minnesota, MINN. STAT. § 517.02; Missouri, MO. REV. STAT. § 451.090; Montana, MONT. CODE ANN. § 40-1-213; Nebraska, NEB. REV. STAT. § 42-105; Nevada, NEV. REV. STAT. 122.020; New Hampshire, N.H. REV. STAT. ANN. § 457:5; New Jersey, N.J. STAT. ANN. § 37:1-6; New Mexico, N.M. STAT. ANN. § 40-1-5; New York, N.Y. DOM. REL. LAW § 7; North Carolina, N.C. GEN. STAT. § 51-2; North Dakota, N.D. CENT. CODE 14-03-02; Ohio, OHIO REV. CODE ANN. § 3101.01; Oklahoma, OKLA. STAT. tit. 43, § 3; Pennsylvania, 23 PA. CONS. STAT. § 1304; Rhode Island, R.I. GEN. LAWS § 15-2-11; South Dakota, S.D. CODIFIED LAWS § 25-1-9; Tennessee, TENN. CODE ANN. § 36-3-106; Texas, TEX. FAM. CODE ANN. § 2.003; Utah, UTAH CODE ANN. § 30-1-9;

Vermont, VT. STAT. ANN. tit. 18, § 5142; Virginia, VA. CODE ANN. § 20-49; Washington, WASH. REV. CODE § 26.04.010; West Virginia, W. VA. CODE § 48-2-301; Wisconsin, WIS. STAT. § 765.02; Wyoming, WYO. STAT. ANN. § 20-1-102; and the District of Columbia, D.C. CODE ANN. § 46-411.

Oregon sets the age at 17 years or older, *see* OR. REV. STAT. § 106.010. Three states (Georgia, Michigan, and South Carolina) set the age at 16, *see* GA. CODE ANN. § 19-3-2; MICH. COMP. LAWS 551.51; S.C. CODE ANN. § 20-1-100, and Alabama sets the age at 14. ALA. CODE § 30-1-4. Finally, two states set different age requirements for males and females – Delaware (18 years for males, 16 years for females), DEL. CODE ANN. tit. 13, § 123, and Mississippi (17 years for males, 15 years for females), MISS. CODE. ANN. § 93-1-5.

Purchase of Alcohol

All 50 states and the District of Columbia set 21 as the legal age for purchasing alcohol. *See*, Alabama, ALA. CODE § 28-1-5; Alaska, ALASKA STAT. § 04.16.050; Arizona, ARIZ. REV. STAT. § 4-101; Arkansas, ARK. CODE ANN. § 3-3-203; California, CAL. HEALTH & SAFETY CODE § 11999; Colorado, COLO. REV. STAT. § 12-47-901; Connecticut, CONN. GEN. STAT. § 30-86; Delaware, DEL. CODE ANN. tit. 4, § 708; Florida, FLA. STAT. ANN. § 562.111; Georgia, GA. CODE ANN. § 3-3-23; Hawaii, HAW. REV. STAT. ANN. § 712-1250.5; Idaho, IDAHO CODE § 23-604; Illinois, 235 ILL. COMP. STAT. 5/6-16; Indiana, IND. CODE § 7.1-5-7-1; Iowa, IOWA CODE § 123.3; Kansas, KAN. STAT. ANN. § 41-727; Kentucky, KY. REV. STAT. ANN. § 244.085; Louisiana, LA. REV. STAT. ANN. § 93.12; Maine, ME. REV. STAT. ANN. tit. 19A, § 652; Maryland, MD. ANN. CODE art. 2B, § 1-201; Massachusetts, MASS. GEN. LAWS ch. 138, § 34C; Michigan, MICH. COMP. LAWS § 436.1703; Minnesota, MINN. STAT. § 340A.503; Mississippi, MISS. CODE ANN. § 67-3-70; Missouri, MO. REV. STAT. § 311.325; Montana, MONT. CODE ANN. § 16-3-301;

Nebraska, NEB. REV. STAT. § 53-103, 53-180; Nevada, NEV. REV. STAT. 202.020; New Hampshire, N.H. REV. STAT. ANN. § 179.10; New Jersey, N.J. STAT. ANN. § 9:17B-1; New Mexico, N.M. STAT. ANN. § 60-3A; New York, N.Y. ALCO. BEV. CONT. § 65C; North Carolina, N.C. GEN. STAT. § 18B-302; North Dakota, N.D. CENT. CODE 5-01-08; Oklahoma, OKLA. STAT. tit. 37, § 604; Ohio, OHIO REV. CODE ANN. § 43-01-22; Oregon, OR. REV. STAT. § 471.105; Pennsylvania, 18 PA. CONS. STAT. ANN. § 6308; Rhode Island, R.I. GEN. LAWS § 3-8-6; South Carolina, S.C. CODE ANN. § 61-4-50; South Dakota, S.D. CODIFIED LAWS § 35-4-78; Tennessee, TENN. CODE ANN. § 57-4-20; Texas, TEX. ALCO. BEV. CODE ANN. § 106.01; Utah, UTAH CODE ANN. § 32A-1-105; Vermont, VT. STAT. ANN. tit. 7, § 2; Virginia, VA. CODE ANN. § 4.1-304; Washington, WASH. REV. CODE § 66.44.290; West Virginia, W. VA. CODE § 60-3-22; WIS. STAT. § 125.02; Wyoming, WYO. STAT. ANN. § 12-6-101; and the District of Columbia, D.C. CODE. ANN. § 25-1002.

Compulsory Education

All 50 states and the District of Colombia make school attendance compulsory for minors within statutorily-set age ranges. *See*, Alabama, ALA. CODE § 16-28-3 (ages 7-16); Alaska, ALASKA STAT. § 14.30.010 (ages 7-17); Arizona, ALASKA STAT. § 14.30.010 (ages 6-16); Arkansas, ARK. CODE ANN. § 6-18-201 (ages 5-17); California, CAL. EDUC. CODE § 48200 (ages 7-17); Colorado, COLO. REV. STAT. § 22-33-104 (ages 7-15); Connecticut, CONN. GEN. ST. § 10-184 (ages 5-17); Delaware, DEL. CODE ANN. tit. 14 § 2702 (ages 5-16); Florida, FLA. STAT. ANN. § 1003.21 (ages 6-16); Georgia, GA. CODE ANN. § 20-2-690.1 (ages 6-15); Hawaii, HAW. REV. STAT. § 302A-1132 (ages 6-17); Idaho, IDAHO CODE § 33-202 (ages 7-16); Illinois, 105 ILL. COMP. STAT. 5/26-1 (ages 6-17); Indiana, IND. CODE § 20-8.1.-3-17 (ages 6-17); Iowa, IOWA CODE § 299.1A (ages 6-15); Kansas, KAN. STAT. ANN. § 72-

1111 (ages 7-17); Kentucky, KY. REV. STAT. ANN. § 159.010 (ages 6-15); Louisiana, LA. REV. STAT. § 17:222 (ages 7-17); Maine, ME. REV. STAT. ANN. tit. 20-A § 3271 (ages 7-16); Maryland, MD. CODE ANN., EDUC. § 7-301 (ages 5-16); Massachusetts, MASS. GEN. LAWS ch. 76 § 1 (authorizes school districts to set ages); Michigan, MICH. COMP. LAWS 380.1561 (ages 6-16); Minnesota, MINN. STAT. § 120A.22 (ages 5-16); Mississippi, MISS. CODE ANN. § 37-13-91 (ages 6-16); Missouri, MO. REV. STAT. § 167.031 (ages 5-17); Montana, MONT. CODE ANN. § 20-5-102 (ages 7-15); Nebraska, NEB. REV. STAT. § 79-201 (ages 7-16); Nevada, NEV. REV. STAT. 392.040 (ages 7-16); New Hampshire, N.H. REV. STAT. ANN. § 193:1 (ages 6-15); New Jersey, N.J. STAT. ANN. § 18A:38-25 (ages 6-15); New Mexico, N. M. STAT. ANN. § 22-12-2 (ages 6-16); New York, N.Y. EDUC. LAW § 3202 (ages 6-16); North Carolina, N.C. GEN. STAT. § 115C-378 (ages 7-16); North Dakota, N.D. CENT. CODE 15.1-20-01 (ages 7-15); Ohio, OHIO REV. CODE ANN. § 3321.01 (ages 6-17); Oklahoma, OKLA. STAT. tit. 56 § 230.66 (ages 6-17); Oregon, OR. REV. STAT. 339.010 (ages 7-17); Pennsylvania, 24 PA. CONS. STAT. § 13-1327 (ages 8-17); Rhode Island, R.I. GEN LAWS § 16-19-1 (ages 7-16); South Carolina, S.C. CODE ANN. § 59-65-10 (ages 7-16); South Dakota, S. D. CODIFIED LAWS § 13-27-1 (ages 7-16); Tennessee, TENN. CODE ANN. § 49-6-3001 (ages 7-16); Texas, TEX. EDUC. CODE ANN. § 25.085 (ages 6-17); Utah, UTAH CODE ANN. § 53A-11-101 (ages 6-17); Vermont, VT. STAT ANN. tit. 16, § 1121 (ages 6-15); Virginia, VA. CODE ANN. § 22.1-254 (ages 5-17); Washington, WASH. REV. CODE § 28A.225.010 (ages 8-17) West Virginia, W. VA. CODE § 18-8-1 (ages 6-15); Wisconsin, WIS. STAT. § 118.15 (ages 6-18); Wyoming, WYO. STAT. ANN. § 21-4-102 (ages 7-15); and the District of Columbia, D.C. CODE ANN. § 38-202 (ages 5-17.)

Driving

In 41 states, a person must be 18 or older to be issued a driver's licenses free of restrictions and prerequisites. These are Alabama, ALA. CODE § 32-6-7.2; Alaska, ALASKA STAT. § 28.15.031; Arizona, ARIZ. REV. STAT. ANN. § 28-3153; Arkansas, ARK. CODE. ANN. § 27-16-604; California, CAL. VEHICLE CODE § 12512; Connecticut, CONN. GEN. STAT. § 14-36; Delaware, DEL. CODE ANN. tit. 21, § 2707; Florida, FLA. STAT. ANN. § 322.05; Georgia, GA. CODE ANN. § 40-5-22; Hawaii, HAW. REV. STAT. ANN. § 286-104; Illinois, 625 ILL. COMP. STAT. 5/6- 103; Indiana, IND. CODE § 9-24-3-2; Iowa, IOWA CODE 321.177; Kansas, KAN. STAT. ANN. § 8-237; Kentucky, KY. REV. STAT. ANN. § 186.440; Louisiana, LA. REV. STAT. ANN. § 32:405.1; Maine, ME. REV. STAT. ANN. tit. 29-A, § 1302; Maryland, MD. CODE. ANN., TRANSP. I § 16-103; Massachusetts, MASS. GEN. LAWS. ANN. ch. 90, § 8; Michigan, MICH. COMP. LAWS ANN. § 257.308; Minnesota, MINN. STAT. § 171.04; Missouri, MO. ANN. STAT. § 302.060; Nebraska, NEB. REV. STAT. § 60-480; Nevada, NEV. REV. STAT. 483.250; New Hampshire, N.H. REV. STAT. ANN. § 263:16; New Jersey, N.J. STAT. ANN. § 39:3-10; New Mexico, N.M. STAT. ANN. § 66-5-5; New York, N.Y. VEH. & TRAF. LAW § 502; North Carolina, N.C. GEN. STAT. § 20-9; Ohio, OHIO REV. CODE. ANN. § 4507.07; Oklahoma, OKLA. STAT. tit. 47, § 6-103; Oregon, OR. REV. STAT. § 807.060; Pennsylvania, 75 PA. CONS. STAT. § 1503; Rhode Island, R.I. GEN. LAWS § 31-10-6; South Dakota, S.D. CODIFIED LAWS § 32-12-6; Tennessee, TENN. CODE ANN. § 55-50-312; Texas, TEX. TRANSP. CODE ANN. § 521.204; Utah, UTAH CODE ANN. § 53-3-204; Vermont, VT. STAT. ANN. tit. 23, § 606; West Virginia, W. VA. CODE § 17B-2-3; and Wisconsin, WIS. STAT. § 343.06. Virginia issues unrestricted driver's licenses only to persons age 19 or older and the District of Columbia issues unrestricted licenses only to persons 21 years or older. *See* VA. CODE ANN. § 46.2-334.01; D.C. CODE ANN. § 50-1401.01.

Four states (Colorado, Idaho, Mississippi and South Carolina) issue unrestricted driver's licenses only to persons age 17 or older. *See*, COLO. REV. STAT. § 42-2-105.5; IDAHO CODE § 49-303; MISS. CODE. ANN. § 63-1-23; and S.C. CODE ANN. § 56-1-40. Finally, four states (Montana, North Dakota, Washington and Wyoming) issue unrestricted licenses only to persons age 16 and older. *See*, MONT. CODE ANN. § 61-5-105; N.D. CENT. CODE § 39-06-03; WASH. REV. CODE § 46.20.031; and WYO. STAT. ANN. 31-7-108.

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IN THE

Supreme Court of the United States

MICHAEL YARBOROUGH, WARDEN OF CALIFORNIA STATE PRISON—LOS ANGELES COUNTY,

Petitioner,

v.

MICHAEL ALVARADO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1) Whether a state court's objectively unreasonable refusal to extend clearly established federal law to a context in which that law should apply is an "unreasonable application of[] clearly established Federal law" under 28 U.S.C. § 2254(d)(1).

2) Whether the California Court of Appeals, in applying a "totality of the circumstances" test, unreasonably applied federal law in deciding that Respondent was "in custody" for *Miranda* purposes without considering, among other relevant circumstances, either the Respondent's known juvenile status or the use of the juvenile's parents to secure his presence for interrogation.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 States.[1] The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

STATEMENT OF THE CASE

Respondent Michael Alvarado was convicted by a California trial court of second degree murder and attempted robbery. Alvarado's co-defendant, Paul Soto, shot the victim in an attempt to steal a truck. The prosecution's primary evidence against Alvarado at trial were his own statements. An investigator elicited those statements during a two-hour interrogation at a police station, before which Alvarado was not given any *Miranda* warnings. At the time he gave the statements, Alvarado was only 17 years old. This fact was known to the investigator, who had used Alvarado's parents' authority over him to secure his presence at the interrogation.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Mr. Soto shot the victim on September 23, 1995. Approximately a month after the shooting, a police investigator "left word" at Alvarado's house that she "needed to speak with him." J.A. 72. The investigator then contacted Alvarado's mother at her office. See *id.* Alvarado's parents agreed to bring him to the station. See *id.* Upon arriving at the station, Alvarado overheard an officer describe him as a "suspect." *Id.* at 189. Alvarado asked an officer whether someone "'should . . . be here with me' during the interrogation, but the officer did not respond. *Id.* at 185-86. As Alvarado was being escorted into the interrogation room, his parents asked to sit with Alvarado during the interrogation; they were told that they needed to "keep out." *Id.* at 186.

Alvarado was not given *Miranda* warnings before or during the interrogation. At the outset of the interrogation, the investigator stated that she had received "permission" from Alvarado's parents "to interview their son," but she did not indicate that she had obtained Alvarado's consent to be interrogated. J.A. 72-73. Alvarado also never stated during the interrogation that his participation was voluntary. J.A. 72-165. Nor did the investigator tell Alvarado that he was not under arrest. See *id.*

When first questioned about the events of September 23, 1995, Alvarado did not say anything about Soto's shooting. See J.A. 73-100. After hearing this account, the officer told Alvarado that she had "been told quite the opposite and we have witnesses that are saying quite the opposite." *Id.* at 101. She urged Alvarado to "be[] honest" and told him that "[y]ou got to make some very tough decisions here about being honest and taking care of yourself and what's going to happen to you." *Id.* at 105. Alvarado acquiesced to the officer's request and made statements that identified Soto as the shooter. See *id.* at 109-49. These statements were later used to implicate Alvarado as an aider and abettor. *Id.* at 338. Well after Alvarado started to make incriminating statements, the interrogator told him that he was free to use the phone and

that he could go home when he had finished. See J.A. at 149-50.

In California Superior Court, Alvarado moved to suppress his statements as the product of a custodial interrogation made without *Miranda* warnings. Alvarado argued that his status as a juvenile was one factor suggesting that he was in custody. See *id.* at 186, 188, 191. The Superior Court denied the motion to suppress without any indication that Alvarado's juvenile status affected the custody determination. The California Court of Appeals similarly failed to consider Alvarado's juvenile status as an objective circumstance affecting the custody determination. See Pet. App. C-17. The Court of Appeal's conclusion that "a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave" was made without any discussion of how the objective facts of Alvarado's juvenile status and the use of his parents to secure his presence affected the custody calculus. *Id.* Nor, for that matter, did the Court of Appeal address Alvarado's knowledge that he was a suspect, or the apparent refusal (through silence) of his request to have someone with him at the interrogation.

Alvarado's petition for a writ of habeas corpus was denied by the District Court for the Central District of California, and granted by the Ninth Circuit Court of Appeals. The Court of Appeals recognized that there was not a Supreme Court holding on all fours with Alvarado's case. Pet. App. A-6. The Court of Appeals concluded, however, that two lines of clearly established Supreme Court law applied to Alvarado's case: (1) this Court's longstanding recognition of the due process implications of juvenile status and (2) the clearly established requirement for a court making a custody determination to examine all the circumstances surrounding an interrogation. See *id.* at A-6-7. In light of those clearly established precedents, the Court of Appeals found that it would be objectively unreasonable for a state court to make a

custody determination while ignoring the circumstance of the suspect's juvenile status. *Id.* at A-23-24.

SUMMARY OF THE ARGUMENT

Section 2254(d)(1) of Title 28 of the United States Code provides that habeas review is available for state court decisions that are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Despite the statute's provision that review should be available for all "unreasonable application[s]" of federal law, Petitioner urges this Court to graft a new limitation onto the statute that would forbid federal habeas relief when a state court refuses to "extend" one of this Court's holdings to a context where it should apply, even if the state court's refusal to apply federal law in that context is objectively unreasonable. Petitioner bases this position on an overly narrow definition of "application" that renders the "unreasonable application" prong of § 2254(d)(1) virtually indistinguishable from the "contrary to" prong.

Petitioner's interpretation is at odds with the judgment of a plurality of this Court, the interpretation of eleven federal courts of appeal, and the language, structure, and intent of the statute. To adopt an interpretation that excluded so-called "failures to extend" from habeas review regardless of whether the state court's actions were objectively reasonable would subvert the statute's focus on the reasonableness of the state court's actions and drastically limit habeas review to the rare circumstances where a state court flatly contradicts an indistinguishable precedent of this Court.

In addition to Petitioner's misstatement of the function and interpretation of § 2254(d), Petitioner also follows the California Court of Appeal in fatally misapplying the standard for habeas review in its determination of whether Respondent was in custody. The state court misapplied this Court's

clearly established law governing the determination of custodial status of a suspect for *Miranda* purposes by failing to consider the age and experience of a suspect as an *objective* factor warranting consideration under this Court's "totality of the circumstances test." See *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995).

Petitioner attempts to evade this Court's long tradition of affording minors special consideration for due process purposes by labeling the Court's jurisprudence in this area a separate "context" analytically distinct from a determination of custodial status. In actuality, both custodial status and the special rights of juveniles in the custodial setting flow from the same basic concern of this Court expressed in *Miranda* that state coercion of individual suspects must be prevented. Moreover, Petitioner's restrictive interpretation of *Miranda* and its test for custodial status undermines the principles announced in that case and in subsequent decisions made by this Court. For these reasons, Petitioner's unduly narrow formulation of the "totality of the circumstances" test is clearly unreasonable, and the unreasonable application of this test by the California Court of Appeal was likewise an unreasonable application of clearly established Federal law under § 2254(d).

ARGUMENT

I. A STATE COURT'S OBJECTIVELY UNREASONABLE REFUSAL TO EXTEND A GOVERNING LEGAL PRINCIPLE IN A CONTEXT WHERE THAT PRINCIPLE PLAINLY APPLIES IS AN UNREASONABLE APPLICATION OF FEDERAL LAW UNDER 28 U.S.C. § 2254(d)(1).

A. A Plurality Of This Court And Several Courts Of Appeals Have Recognized That Objectively Unreasonable Failures To Extend Federal Law Are "Unreasonable Applications" Under Section 2254(d)(1).

Under 28 U.S.C. § 2254(d)(1), an application for a writ of habeas corpus may not be granted unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[2] The statute thus recognizes two categories of state court legal determinations that may be corrected on federal habeas review: decisions that are directly contrary to clearly established federal law; and decisions that otherwise unreasonably apply clearly established federal law. See *Williams* v. *Taylor*, 529 U.S. 362, 404-05 (2000). In other words, state court decisions that are not directly contrary to this court's holdings are to be judged under a rule of reasonableness; if the state court's decision was objectively unreasonable in light of then-current clearly established federal law, then a writ of habeas corpus may be granted.

In *Williams*, this Court held that a state court decision is an "unreasonable application" of federal law under § 2254(d)(1) when "the state court's application of clearly established federal law [i]s objectively unreasonable." 529 U.S. at 409. The Court held that the "unreasonable application" language

[2] Section 2254(d)(2) does not apply to this case.

"certainly" encompassed state court decisions "that correctly identif[y] the governing legal rule but appl[y] it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. The Court further recognized that "unreasonable application" might also encompass "state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply)." *Id.* at 408. The Court did not resolve definitively the question of whether unreasonable refusals to extend a legal principle were "unreasonable application[s]." *Id.* at 408-09.

In *Ramdass* v. *Angelone*, a four-justice plurality of this court answered the question left open by *Williams*, recognizing that § 2254(d)(1) permits habeas relief to correct a state court's objectively unreasonable failure to extend an established legal principle to a context in which the principle should have applied. 530 U.S. 156, 166 (2000) (plurality). Ramdass argued that the rule of *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), which entitled parole-ineligible defendants to an instruction on their parole ineligibility, should be extended to his case, where he was not yet parole-ineligible but was likely to become so. *Ramdass*, 530 U.S. at 163-64. The plurality agreed with Ramdass that refusals to extend clearly established federal law could be "unreasonable application[s]" under § 2254(d)(1), finding that "[a] state determination may be set aside under this [unreasonable application] standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Id.* at 166. The plurality concluded, however, that the Virginia Supreme Court had not acted unreasonably in refusing to extend the *Simmons* rule to his situation. See *id.* at 169. Neither of the other two opinions in *Ramdass* questioned the plurality's recognition that

unreasonable refusals to extend clearly established federal law are unreasonable applications of federal law.

Indeed, eleven federal court of appeals have agreed with the *Ramdass* plurality that a state court's unreasonable refusal to extend clearly established federal law to a situation in which that law should apply would be an "unreasonable application" under § 2254(d)(1). See *Kibbe* v. *DuBois*, 269 F.3d 26, 36 (1st Cir. 2001), *cert. denied*, 535 U.S. 960 (2002); *Kennaugh* v. *Miller*, 289 F.3d 36, 45 & n.2 (2d Cir.), *cert. denied*, 537 U.S. 909 (2002); *Williams* v. *Price*, 343 F.3d 223, 229 (3d Cir. 2003); *Booth-El* v. *Nuth*, 288 F.3d 571, 575-76 (4th Cir.), *cert. denied*, 537 U.S. 959 (2002); *Penry* v. *Johnson*, 215 F.3d 504, 508 (5th Cir. 2000), *aff'd in part, rev'd in part*, 532 U.S. 782 (2001); *Patterson* v. *Haskins*, 316 F.3d 596, 603 (6th Cir. 2003); *Armstrong* v. *Bertrand*, 336 F.3d 620, 624 (7th Cir. 2003); *Carter* v. *Kemna*, 255 F.3d 589, 592 (8th Cir. 2001), *cert. denied*, 534 U.S. 1085 (2002); *Alvarado* v. *Hickman*, 316 F.3d 841, 853 (9th Cir. 2002); *Carter* v. *Ward*, 347 F.3d 860, 864 (10th Cir. 2003); *Hawkins* v. *Alabama*, 318 F.3d 1302, 1307 & n.3 (11th Cir. 2003).

Petitioner selectively quotes from the Eleventh Circuit's opinion in *Hawkins* to support its extreme position that a failure to extend a Supreme Court holding to an analogous context can never be an unreasonable application of federal law. See Petr's Br. 20. In fact, the Eleventh Circuit held that failures to extend could be unreasonable applications if "extend" meant:

> [T]o apply the *ratio decidendi* of Supreme Court decisions fully and completely (and not in some crabbed way) so that the rule of law covers new and different facts and circumstances as long as the new facts and circumstances – *objectively reasonably viewed* – are materially or . . . substantially the same that were in the mind of the Supreme Court when it laid down the rule.

318 F.3d at 1307 n.3 (emphasis added); see also *Bottoson* v. *Moore*, 234 F.3d 526, 531 (11th Cir. 2000) (again recognizing that refusals to extend can be unreasonable applications). The Eleventh Circuit's test, like those of other circuits, focuses on the objective reasonableness of the state court's failure to extend the law. A state court is not required to extend Supreme Court law to a new situation if the state court reasonably concludes that the situation before it presents "'substantially different circumstances' . . . [that] might make a difference on whether or not the Supreme Court's preexisting decisional principles laid down in one set of circumstances would apply to the new circumstances." *Hawkins*, 318 F.3d at 1307 n.3. If a fair application of those principles reasonably requires extension to a similar but distinct set of circumstances, however, then federal courts are nor precluded under § 2254(d)(1) from granting habeas relief.

B. By Its Terms, Section 2254(d)(1) Applies To Unreasonable Failures To Apply Federal Law In Contexts Where That Law Should Apply.

1. The Law That Is "Clearly Established" By This Court's Holdings Includes Both Specific Rules And Broader Constitutional Principles, Both Of Which Must Be Applied Reasonably By State Courts.

Petitioner maintains that the "'clearly established Federal law'" propounded by this Court's holdings is limited to a narrow class of precisely articulated rules, which do not govern a state court's determination of a constitutional issue unless the state court's decision is "irreconcilable" with that "limited, core set of rules." Petr's Br. 12. Petitioner further contends that "clearly established Federal law" by definition cannot be used in a "novel context." *Id.* This cramped definition of the "law" established by this Court both fails to appreciate the nature of much of this Court's jurisprudence and ignores the necessity for state courts to fairly apply

clearly established constitutional standards and principles, as well as specific constitutional rules.

This Court's constitutional holdings are not restricted to a "limited, core set of rules." Petr's Br. 12. Constitutional jurisprudence does encompasses precise rules designed to address specific situations, such as the rule that an officer with probable cause to suspect a civil traffic violation may make a traffic stop regardless of the officer's intent. See *Whren* v. *United States*, 517 U.S. 806 (1996). But constitutional jurisprudence is not limited to those precise rules; it also encompasses broader constitutional standards and principles that can apply in multiple contexts. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Terry* v. *Ohio*, 392 U.S. 1 (1968). The "governing legal principle[s]" announced by the court are an essential part of constitutional jurisprudence. *Lockyer* v. *Andrade*, 123 S. Ct. 1166, 1175 (2003); cf. *Taylor* v. *Withrow*, 288 F.3d 846, 850 (6th Cir.) ("[C]learly established law under [§ 2254(d)(1)] encompasses more than just bright-line rules laid down by the Court. It also clearly includes legal principles and standards enunciated in the Court's decisions."), *cert. denied*, 537 U.S. 1007 (2002).

This Court recognized in *Andrade* that a broad "governing legal principle" is clearly established federal law, even for "a set of facts different for those of the case in which the principle was announced." 123 S. Ct. at 1175; see also *Wiggins* v. *Smith*, 123 S. Ct. 2527, 2535 (2003). The *Andrade* court treated the "gross disproportionality principle" as "clearly established law," even though the "precise contours" of the principle were unclear. 123 S. Ct. at 1173. Because the gross disproportionality principle "reserve[d] a constitutional violation for only the extraordinary case," under the facts of *Andrade* the California Court of Appeal did not act unreasonably by refusing to apply it to Andrade. *Id.* at 1175. The gross disproportionality principle was nonetheless

"clearly established law" that required at least the Court of Appeal's consideration.

A holding of this Court certainly will constitute clearly established law if it prescribes a rule to be applied to identical facts, but it will also constitute clearly established law as to cases presenting a different set of facts if "the force . . . [of] the precedent's underlying principle applies." *Wright* v. *West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). Limiting the definition of "clearly established federal law" to factually indistinguishable cases would eviscerate habeas review of state court rulings on any fact-specific standard that requires courts to apply general tests to evaluate the totality of the circumstances. Standards such as "reasonable suspicion," "probable cause," and "voluntariness" are necessarily applied in "novel contexts," but they are no less "clearly established law." See *Id.* at 309 (Kennedy, J., concurring).

2. Petitioner Distorts The Plain Language Of Section 2254(d)(1).

The keystone of Petitioner's argument that failures to extend federal law can never be unreasonable applications of federal law is its cramped definition of "application." Petitioner asserts, without citation, that "application" "presupposes the existence of commonly understood rules within a recognized and established context." Petr's Br. 19.

"Application," however, is not limited to the rote usage of a rule in a previously established context. To "apply," in a legal sense, is "to make use of as suitable, fitting, or relevant." *Webster's Third New International Dictionary* 105 (1993); see also 1 *The Oxford English Dictionary* 577 (2d ed. 1989) (defining "apply" as "[t]o bring (a law, rule, test, principle, etc.) into contact with facts, to bring to bear practically" and "[t]o have a practical bearing upon, a valid or suitable reference *to*."). "Applying" a precedent to a new case, therefore, does not imply that the precedent will match the case in all respects; "applying" rather implies that the

precedent is "suitable, fitting, or relevant" to a non-identical situation. Indeed, Petitioner's definition plainly contradicts much of first-year legal education's reliance on the case method.

Petitioner's reliance on the distinctions between "application" and "extension" misses the point. "Extension" and "application" are not synonyms, but they are also not mutually exclusive. "Extend" is a "[t]erm [that] lends itself to [a] great variety of meanings, which must in each case be gathered from context." *Black's Law Dictionary* 583 (6th ed. 1990). While in some senses "extend" can be used to describe an innovation or expansion, in other situations "extend" means "to stretch or pull out . . . *to its full size*." 5 *The Oxford English Dictionary* 594 (2d ed. 1989) (emphasis added). The failure to make an extension that represents an "expansion" of federal law will, in many situations, not be objectively unreasonable. The failure to extend precedent to a situation where the precedent reasonably must apply, however, would be an objectively unreasonable failure to apply the full import of the precedent. The question under § 2254(d)(1) is not a semantic determination of whether the state court decision was an "application" or an "extension"; it is a question of the objective reasonableness of the state court's decision.

Petitioner is correct that in some cases an extension of Supreme Court precedent to a new context will not be a necessary corollary to the original holding. In such cases, the objective reasonableness standard appropriately protects a state court's reasonable interpretation of governing law. See, *e.g.*, *Andrade*, 123 S. Ct. at 1173 (holding that state court did not act unreasonably for failing to apply gross disproportionality principle where Supreme Court precedent did "not establish[] a clear or consistent path for courts to follow").

Reasonably "applying" federal law requires more than a rote determination of whether this Court has ruled on the

precise facts in the present case. Applying federal law means "to bring" precedent "to bear" on the present facts, to determine whether current federal law has "a valid or suitable reference to" the present facts, and to determine whether the precedent is "suitable, fitting, or relevant" to decide the present case. This definition of "application" is consistent with this Court's recognition that "applying" law necessarily includes extending precedent to "'a set of facts different from those of the case in which the principle was announced.'" *Wiggins*, 123 S. Ct. at 2535; *Andrade*, 123 S. Ct. at 1175.

3. Petitioner's Interpretation Of Section 2254(D)(1) Also Distorts The Structure Of That Statute.

Petitioner's narrow reading of "application" also robs the "unreasonable application" prong of § 2254(d)(1) of any meaning independent from that of the "contrary to" prong. This Court has been "'reluctan[t] to interpret a statutory provision so as to render superfluous other provisions in the same enactment,'" *Freytag* v. *Commissioner*, 501 U.S. 868, 877 (1991), and has specifically held that the two prongs of § 2254(d)(1) have "independent meaning." *Williams*, 529 U.S. at 404. If "application" refers only to the use of "commonly understood rules within a recognized and established context," Petr's Br. 19, then it is difficult to imagine a situation in which a court could unreasonably apply those commonly understood rules within that recognized and established context without also acting "contrary to" those rules. For the "unreasonable application" language of § 2254(d)(1) to have independent effect, "application" must mean something more than a rote application of precedent to indistinguishable facts. See *Andrade*, 123 S. Ct. at 1175 ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.").

4. This Court's *Teague* Jurisprudence Does Not Support Petitioner's Narrow Reading Of "Clearly Established Federal Law" Cases.

Petitioner attempts to find justification for its narrow reading of "clearly established federal law" in this court's retroactivity jurisprudence. Petitioner's reliance on *Teague* v. *Lane*, 489 U.S. 288, 301 (1989), and its progeny is misplaced for at least three reasons. First, although it is true that "whatever would qualify as an old rule under . . . *Teague* jurisprudence will constitute 'clearly established Federal law'" under § 2254(d)(1), *Williams*, 529 U.S. at 412, this court has never held that a constitutional principle *must* qualify as an old rule to constitute clearly established law. Indeed, this Court has commented that in some respects "the 'clearly established Federal law' phrase bears only a slight connection to our *Teague* jurisprudence." *Id.* Second, this Court has specifically rejected the Fourth Circuit's use of an "all reasonable jurists" test derived from *Teague* cases to make a § 2254(d)(1) reasonableness determination. *Id.* at 409-10.

Third, this Court has never held that an "old rule" for *Teague* purposes is limited to the narrow rulings of this Court and not the broader principles announced by this Court. *Teague* restricted the retroactive application of constitutional rules to those "dictated by precedent" at the time petitioner's conviction became final. 489 U.S. at 301 (emphasis omitted). This Court has recognized, however, that precedent could dictate an extension of principle to a new situation if the state court "would have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution." *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990); see *Stringer* v. *Black*, 503 U.S. 222, 229 (1992). In *Stringer*, this court recognized that extending the holding of *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), as to a Georgia capital sentencing scheme to a differently structured Mississippi sentencing scheme was nonetheless dictated by the principles

underlying *Godfrey*. In *Stringer* clear differences existed between the Mississippi and Georgia sentencing systems; however, "those differences could not have been considered a basis for denying relief in light of [then-existing] precedent." *Stringer*, 503 U.S. at 229.

5. A State Court's Decisions On Whether Or Not To Extend A Constitutional Principle To A New Context Should Be Viewed Under An Objective Rule Of Reasonableness.

Decisions by a state court to extend or not to extend a constitutional principle to a new situation should be judged in the same way that other "unreasonable applications" of federal law are judged, by whether the state court's decision was objectively reasonable. By permitting federal habeas review of "unreasonable application[s]" of federal law, Congress established that the central question for the second prong of § 2254(d)(1) is the reasonableness of the state court's decision.

Petitioner asks this court to depart from this rule of reasonableness in situations where the state court extended or failed to extend a constitutional principle to a new context. Petitioner's claim that the statute forbids habeas review of any "extensions" would require federal courts to engage in an "extension" analysis to determine whether a state court's unreasonable application of a statute was a "failure to extend." Indeed, Petitioner recognizes that his interpretation will require "[c]areful scrutiny of purported 'applications' . . . to avoid hidden 'extensions' of law." Petr's Br. 21. Requiring federal courts to engage in the complicated semantics of distinguishing an "application" from an "extension" would distract reviewing courts from the inquiry mandated by the statute: whether the state court acted unreasonably in light of clearly established Supreme Court law.

Petitioner also recognizes that its reading of § 2254(d)(1) would eliminate any habeas review of state court decisions that are not, in its unusual parlance, "egregiously indefensible." *Id.* at 10. Under petitioner's interpretation, state courts would be required to comply only "with a limited, core set of rules" directly derived from the precise holdings of this Court. *Id.* at 12. To reasonably apply this Court's holdings, however, state courts must show "conceptual faithfulness" to those holdings, not merely a "decisional obedience." *Desist* v. *United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting). Such a "conceptual faithfulness" would not require state courts to predict the future development of the law or to extend Supreme Court holdings to areas where they reasonably might not apply. It simply requires state courts to fairly and reasonably apply not only the precise specifics of this Court's decisions in factual circumstances that are entirely similar, but also the reasoning and the implications of those decisions to circumstances that may be distinct, but are not entirely novel.

Moreover, Petitioner's assertion that state courts need only comply with a "limited, core set of rules" is no more helpful than its suggestion that state court decisions must be upheld unless they are "egregiously indefensible." Petitioner's persistent reference to a "limited, core set of rules" evokes an undefined conception of a hierarchy of constitutional principles. But there is no suggestion in this Court's jurisprudence that "clearly established Federal law" involves only a "core" or "subset" of this Court's rulings. Similarly, there is nothing in this Court's jurisprudence to suggest that "established law" becomes "clear" only after repeated rulings. If Petitioner meant instead to say that only the particular holding *within* a decision of this Court may be applied to other cases, then the phrase "limited, core set of rulings" says nothing other than to repeat the simple rule that only the holding of this Court stands of precedent.

State courts need not extend federal law "presciently," but they should "reasonably" consider the implications of federal law and extend it to situations where it should apply. *O'Dell* v. *Netherland*, 521 U.S. 151, 166 (1997). Section 2254(d)(1) makes clear that federal courts are to respect a state court's reasonable resolution of a contested constitutional issue. It is equally clear, however, that a state court must reasonably apply this Court's interpretation of the Constitution. A state court may not ignore this Court's articulation of a constitutional principle merely because this Court has not articulated a bright-line rule. "[C]onceptual faithfulness" to constitutional principles requires more. *Desist*, 394 U.S. at 277 (Fortas, J., dissenting).

Section 2254(d) is not a license for state courts to myopically ignore the full implications of federal law. In a federal system, state courts should be expected to conscientiously apply the Court's decisions to their full extent and to extend those precedents to new situations if "the precedent's underlying principle applies" in the new situation. *Wright*, 505 U.S. at 304 (O'Connor, J., concurring). When the state court's decision not to extend those precedents is objectively unreasonable, § 2254(d)(1) allows habeas relief.

II. THE CALIFORNIA COURT OF APPEALS MISAPPLIED CLEARLY ESTABLISHED LAW BY FAILING TO CONSIDER THE AGE AND EXPERIENCE OF A SUSPECT AS A FACTOR RELEVANT TO CUSTODIAL STATUS.

This case presents a clear example of the appropriate function of an "application" analysis by a court reviewing a habeas petition under § 2254(d)(1). The state court misapplied the "totality of the circumstances" test used to determine the custodial status of a suspect by failing to consider the special considerations afforded juveniles in all other aspects of *Miranda* jurisprudence to the custody calculus. The Court of Appeals properly recognized in its habeas review that the failure to extend clearly established

constitutional considerations of a particular circumstance (in this case, the status of the suspect as a juvenile) into a test mandating consideration of all relevant circumstances necessarily implied that the state court applied the test in an unreasonable manner.

Petitioner now asks this Court to condone the California Court of Appeal's oversight. Petitioner argues strenuously that age is not a relevant circumstance for consideration of custodial status, and that the special procedural safeguards afforded minors do not apply in the context of custodial status. See Petr's Br. 26-28. Both arguments are fatally defective: the former because it confuses an objective consideration of the age of the suspect, which is appropriate for a full and total understanding of the circumstances surrounding an interrogation, with an idiosyncratic analysis of an individual juvenile's state of mind; the latter because it fails to apprehend the common concerns informing both a determination of voluntariness and a determination of custodial status.

Whether reached through "application" or "extension," the inescapable truth remains that the California Court of Appeal's failure to consider the status of Michael Alvarado as a juvenile in its determination of "custody" for *Miranda* purposes was manifestly unreasonable in light of this Court's precedent. Petitioner's argument must therefore be rejected, and the Court of Appeals' decision affirmed.

A. Clearly Established Law Under *Miranda*.

This Court established in *Andrade* that, "[a]s a threshold matter" for habeas claims reviewed under § 2254(d), it must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States." *Andrade*, 123 S.Ct. at 1172 (quoting § 2254(d)(1)). In this case, all "clearly established Federal law" flows from this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *Miranda* declared unconstitutional the use of statements

obtained from defendants during custodial interrogations where those defendants were not informed of their constitutional rights. *Id.* at 444.[3]

The purpose of the *Miranda* requirements is to ensure that a base line of protection is established for *all* suspects subjected to a minimal threshold of coercion by the government. Otherwise, "no statement obtained from the defendant [could] truly be the product of his free choice." *Id.* at 458. This threshold was set at the level of custody because "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

The *Miranda* Court eschewed a formalistic approach to custodial determinations. It defined "custodial interrogation" to mean "questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way*." *Id.* at 444 (emphasis added). This broad mandate is consistent with the purpose of *Miranda* to eliminate avenues for state-sanctioned coercion. See *Berkemer* v. *McCarty*, 468 U.S. 420, 433 (1984).

Subsequent decisions by this Court have established that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury* v. *California*, 511 U.S. 318, 323 (1994). To assist in this objective determination of custodial status, this Court has articulated a clear, straightforward test :

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[3] The rights afforded a suspect under custodial interrogation include "a right to remain silent, that any statement he does make may be used as evidence against him; and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.

Keohane, 516 U.S. at 112 (footnote omitted).

Any fact necessary to set the scene of the interrogation should be considered in the "totality" analysis. *Id.* at 112 Properly applied, the test allows a court to reach the 'ultimate inquiry as to whether there was a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Id.* at 112. Where the test is not applied properly, however, the determination of "custody" is skewed, and the possibility of coercion affecting the suspect's decision to confess is heightened.

B. The Age Of A Suspect Is An Important Factor In Determining Whether The Conduct Of The Government Is Objectively Coercive.

The Ninth Circuit's decision proceeds from the unremarkable observation that the age of a suspect might actually bear some relation to the overall coercive effect of a quasi-custodial situation. Pet. App. A-2. According to Petitioner, however, this Court should hold not only that the connection between age and coerciveness is not obvious, but that the connection does not exist at all. Petr's Br. 29-40. This argument defies both common sense and the vast majority of precedent on the subject, and places at risk the very values the *Miranda* warnings were crafted to protect.

It is impossible to determine whether the conduct of the police is coercive in an objective sense without understanding the context of that conduct. "[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan* v. *Chestermut*, 486 U.S. 567, 573 (1988)

(discussing test for determination of "seizure" under the Fourth Amendment). For example, a police officer who tells every suspect he interrogates that the suspect can leave at any time but refuses to open the door to the interview room for the suspect would not be viewed ordinarily as engaging in custodial interrogation, but a reasonable person observing the proceedings might perceive things differently if the suspect was a paraplegic who *could not* leave the room without the assistance of the interrogating officer.[4] The necessarily fact-specific nature of custody determinations led the Court in *Berkemer* to reject bright line rules for custodial status, and to apply the totality of the circumstances test in *Keohane*. See *Berkemer*, 468 U.S. at 441-42; *Keohane*, 516 U.S. at 112.

The special vulnerabilities attendant to youth are well-known to this Court. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988). Add to this list the smaller physical dimensions of minors, the lack of independent finances or mobility, and the dependence on set authority figures for shelter and guidance, and the ordinary minor emerges as a very frail suspect indeed. These frailties are not lost on government interrogators, who are 'acutely aware of the potentially incriminatory nature of the disclosures sought,' *Minnesota* v. *Murphy*, 465 U.S. 420, 429-30 (1984), and can readily use a youth's inexperience, physical and emotional

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[4] In a similar vein, an adult taken to a police station by a friend would not reasonably interpret the absence of that friend in the interrogation as a coercive act. A *minor*, on the other hand, would undoubtedly associate an officer's assertion of authority over his parents with an assertion of authority over himself, not (only) because of his personal state of mind, but because he is *actually* subject to the authority of his parents. No reasonable person, juvenile or otherwise, would believe he was free to terminate an interrogation where his own authority figures were not free to do the same.

limitations, and dependence on parental figures for support to confine a juvenile through techniques that would not work against an adult.[5]

This Court has long acknowledged the special vulnerabilities of juveniles in the context of custodial interrogations, cautioning that 'admissions and confessions of juveniles require special attention.' *In re Gault*, 387 U.S. 1, 45 (1967), *quoted in* Pet. App. A-15; *accord Gallegos* v. *Colorado*, 370 U.S. 49, 54 (1962). In *Haley* v. *Ohio*, 332 U.S. 596 (1948), this Court overturned a conviction for murder premised on the alleged "confession" of a 15 year-old African-American boy. *Haley*, 332 U.S. at 601. The Court specifically noted the "tender and difficult age" of the defendant as a factor in its determination that the defendant's confession was coerced. *Id.* at 599. In the case of *In re Gault*, this Court emphasized that "[w]ith respect to juveniles, both common observation and expert opinion emphasize that the 'distrust to confessions made in certain situations' . . . is imperative in the case of children from an early age through adolescence." 387 U.S. at 48. More recent decisions by this Court only confirm the need for special attention to juvenile confessions in general due to the unique characteristics of minors as a group. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 693 (1993), *Fare* v. *Michael C.*, 442 U.S. 707, 725-27 (1979).[6]

[5] The instant case provides a good example of just such abuse by the police. Michael Alvarado was driven to the station house by his parents without ever agreeing to go there himself. Once at the station house, he was not allowed access to them during the course of his interrogation. J.A. 72-73, 185-86. Moreover, the interrogating officer in the case did not bother to tell Alvarado he was free to go until *after* he made several inculpatory statements. *Id.* 149-50. From the start of his interrogation to the point of his confession, Alvarado had no way of leaving the station without the assistance of the police and was given no indication that he would receive such assistance upon request.

[6] Age matters outside the confines of *Miranda* as well. As the Supreme Court noted in *Goss* v. *Lopez*, 419 U.S. 565 (1975), age plays a role "in

Bereft of any response to the weight of this Court's precedent mandating special consideration for the age of a suspect in the context of juvenile interrogations, Petitioner instead mischaracterizes the Ninth Circuit's position as a "subjective" inquiry into the "state of mind" of an 'unreasonable' juvenile. See Petr's Br. 36-39. Yet, the language of *Alvarado* itself describes the Ninth Circuit's approach as a "modified" objective test akin to the test employed by the Tenth Circuit in *Erving L.* See Pet. App. A-14. In that case, the Tenth Circuit explicitly *refused* to consider the *subjective* impressions of a juvenile in determining the custodial status of a minor. See *United States* v. *Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998). Instead, the Tenth Circuit advocated a "reasonable juvenile" standard that would look to see whether a reasonable person of the suspect's age and experience would feel free to terminate the interrogation. See *id.* The age of the suspect would be relevant, the court held, to the extent that "the officers were aware of [the suspect's] particular traits *and* those traits influenced the actions of the officers." *Id.*

The Tenth Circuit's decision in *Erving L.* underscores the difference between the objective consideration of a suspect's age and the type of subjective inquiry used for voluntariness and waiver determinations. In terms of voluntariness or waiver, the age of the suspect is used as a proxy to determine the ability of the *individual* to resist the coercive practices of

contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Id.* at 590-91. Juveniles below the age of sixteen are immunized from the death penalty, see generally *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988), and children are insulated from the type of vulgar and lewd speech usually protected by the First Amendment. *See, e.g., Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986) (allowing restrictions on student speech that is vulgar or lewd because of the sensitive nature of young students), *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978) (permitting federal agency to regulate conduct of speech at certain times when children are likely to hear the speech).

the government. In contrast, age is an important consideration in the context of custodial status because it informs an objective determination of the behavior of the *government*. Compare *Dickerson* v. *United States*, 530 U.S. 428, 434 (2000) ("The due process test takes into consideration 'the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'"), with *Keohane*, 516 U.S. at 112 (considering only "the circumstances surrounding the interrogation"). It helps the objective viewer to "set the scene" by placing the conduct of the government within a larger context.

The state of mind of a suspect is unquestionably a subjective inquiry reserved soleley for a voluntariness or waiver inquiry. But the age of a suspect is also a type of frailty that, *if known* by the police, is relevant to the objective determination as to whether the conduct of the police deprived the suspect of her freedom to leave. See *Erving L.*, 147 F.3d at 1248. This Court explained the difference between a purely subjective factor and a subjective characteristic that objectively affects the circumstances of the proceedings in its discussion of the subjective intent of interrogating officers in *Stansbury*. There, the Court held that the an interrogating officer's subjective views as to whether the individual was a suspect did not matter in a custody determination "save as they are communicated [to the suspect] or otherwise manifested." *Stansbury*, 511 U.S. at 324 (citation omitted) The Court's point here can hardly be missed: where a peculiar circumstance of the individual is injected into the interrogation by the officer (whether by word or action), that circumstance bears upon the custody determination. *Id.* at 325.

A reviewing court simply *cannot* judge the conduct of an interrogating officer without considering all the salient facts relating to the subject of that conduct. The custody inquiry may not 'place upon the police the burden of anticipating the

frailties or idiosyncrasies of every person whom they encounter,' *Berkemer*, 468 U.S. at 442 n.35, but neither does it sanction the abuse of those frailties or idiosyncrasies by the government. The Ninth Circuit properly recognized this self-evident proposition, and on that basis granted Mr. Alvarado's petition for habeas. This Court should do no less; accordingly, the decision of the Ninth Circuit should be affirmed.

C. It Is UnreasonableTo Use A "Reasonable Person" Standard That Does Not Consider The Age Of A Suspect Under This The Clearly Established Due Process Law Of This Court.

Petitioner argues that the Ninth Circuit "improperly applied § 2254(d)(1) by requiring the state court to extrapolate Supreme Court precedent from the voluntariness context to a 'custody' determination in a way this Court has never done." Petr's Br. 24. Consistent with Petitioner's professed view that failures to "extend" clearly established precedent can *never* be declared unreasonable, Petitioner assails the Ninth Circuit's consideration of Michael Alvarado's age as an "engraft[ing]" of law from another "context." *Id.* at 26. In actuality, it is Petitioner who, like the California Court of Appeals before him, misapplies the clearly-established law of this Court through Petitioner's unduly restrictive interpretation of this Court's due process jurisprudence. As this Court noted in *Thompson*:

> "We must never hesitate to apply old values to new circumstances. . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails his judicial duty."

Thompson, 487 U.S. at 821 n.4 (quoting *Ollman* v. *Evans*, 750 F.2d 970, 995-96 (1984) (en banc) (Bork, J., concurring)).

In this case, Petitioner's crabbed interpretation of *Miranda* threatens to eviscerate the principles of that decision where juveniles are concerned by transforming the "reasonable person" standard of *Keohane* into what amounts to a "reasonable adult" standard precluded from considering the relevant circumstance of a suspect's age and experience. This Court has criticized similar "divide-and-conquer" analyses in the past. See *United States* v. *Arvizu*, 534 U.S. 266, 275 (2002) (refusing to separate out individual facts from totality of the circumstance analysis for Fourth Amendment purposes). Petitioner's standard contradicts the princples underlying both *Miranda* and *Keohane*, ignores applicable federal and state case law, and would lead to manifest inequities in the way juveniles in this country are treated by interrogating officers. It would read the "reason" right out of the "reasonable person" standard, and therefore should be rejected by this Court.

The custodial inquiry of *Miranda* is not so attenuated from the voluntariness inquiry as Petitioner would have this Court believe. *Miranda* was concerned with the inherent coerciveness of custodial interrogation, and its warnings were established to remove the heightened risk of coercion in this environment. See *Miranda*, 384 U.S. at 455, *Dickerson*, 530 U.S. at 435. By the same token, this Court's voluntariness jurisprudence is necessarily rooted in considerations of coerciveness. For Petitioner to suggest that the special vulnerabilities of minors noted by this Court in the context of voluntariness have no bearing whatsoever as to whether an interrogation of a juvenile "exerts upon [him] pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights" strains credulity. *Berkemer*, 468 U.S. at 437.

Petitioner's rigid construction of this Court's due process jurisprudence contravenes "[t]he purposes of the safeguards prescribed by *Miranda* . . . to ensure that the police do not coerce or trick captive suspects into confessing . . . and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." *Berkemer*, 468 U.S. at 433. Petitioner's approach would actually *increase* the risk that vulnerable youths may be "coerce[d] or trick[ed]" by forcing courts to turn a blind eye to the abuse of a minor's vulnerabilities by interrogating officers.

Moreover, the "reasonable adult" standard advocated by Petitioner would only increase the number of voluntariness and waiver claims brought before the courts. Even the Solicitor General concedes that children who might be protected by *Miranda* under a "reasonable juvenile" standard would be forced to bring a voluntariness action instead under the absolute "reasonable adult" standard advocated by Petitioner and the Solicitor General. Brief for the United States as *Amicus Curiae* Supporting Petitioner (hereinafter the "S.G. Brief") 11-14. Petitioner decries the supposed duality of *Miranda* standards for adults and juveniles under the Ninth Circuit's approach, yet it is Petitioner's formalistic "reasonable adult" standard that would force children back to the pre-*Miranda* standards of voluntariness and waiver rather than afford them protection substantively equivalent to that of adults. Such an approach is neither efficient nor fair; it is also obviously at odds with the precedent of this Court.

In addition to contradicting the general principles of *Miranda*, Petitioner's approach does not even fulfill the limited purpose of the 'reasonable person' test itself. "The test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the [Fifth] Amendment." *Chesternut*, 486 U.S. at 574 (explaining the purpose of the test in the similar context

of seizure determinations under the Fourth Amendment). "This 'reasonable person' standard also ensures that the scope of the [Fifth] Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.* at 574.

Neither of these purposes is served by Petitioner's imposition of an inflexible "reasonable adult" standard. The first goal, "to allow the police to determine in advance whether the conduct contemplated" violated the suspect's due process rights cannot be met through rote practice, but rather requires independent analysis by individual interrogators as to all the circumstances surrounding their interrogations. See *Berkemer*, 468 U.S. at 441 (refusing to apply a bright-line test for custody determinations). In this context, forcing interrogators to guess whether the factual circumstances before them *would* be coercive were the suspect an adult instead of a child complicates rather than simplifies the fact-specific determination required of the interrogator.[7]

Petitioner fails miserably to fulfill the second goal of the "reasonable person" test as well. Subjecting children to the same amount of interrogation as an adult does not ensure that the scope of the *Miranda* protection remains invariant regardless of the state of mind of the particular individual being approached; to the contrary, it *guarantees* that all minors could be subjected to intentionally and objectively coercive tactics that would not be coercive against adults.

Moreover, the decision of the California Court of Appeals did not occur in a vacuum. As the Ninth Circuit noted, no

[7] Petitioner repeatedly expresses concern that law enforcement will suddenly be required to warn *all* juveniles of their constitutional rights at *all* times. This concern overlooks the obvious restriction of the objective test: specifically, that the age of a suspect would only become a factor in the "totality" inquiry where the age of the suspect was subjectively known or objectively knowable by the officers, *and* where the officers used that knowledge against the youth.

less than twenty-four state jurisdictions[8] (not to mention the Tenth Circuit Court of Appeals[9] and at least two federal district courts[10]) consider the age of a suspect in determining custodial status. These courts recognize that which Petitioner tries so hard to obfuscate – that voluntariness and custodial status are not two separate "contexts," but rather separate permutations of a shared due process principle.

Given the long body of precedent by this Court affirming the special needs of juveniles for custody purposes, the overwhelming weight of authority in other federal and state courts, and the incontrovertible logic behind the Court of Appeal's position, the California Court of Appeals cannot be said to have reasonably overlooked the factors of age and experience in rendering its decision as to the custodial status of Michael Alvarado. All Michael Alvarado wanted, and all

[8] *See, e.g.*, *People* v. *J.C.*, 844 P.2d 1185, 1189-90 (Colo. 1993) (noting that "the age and experience of the juvenile should weight heavily in a consideration of the circumstances' of a confession.") (internal quotation marks omitted) (quoting *Taylor* v. *United States*, 380 A.2d 989, 992 n.6 (D.C. 1977); *People* v. *Fasse*, 528 N.E.2d 1049, 1052 (Ill. App. Ct. 1988) ("Factors to be considered [for purposes of custody determination] include . . . the age and intelligence of the suspect."); *In re Owen F.*, 523 A.2d 627, 630 (Md. Ct. Spec. App. 1987) (applying 'a wider definition of custody for *Miranda* purposes' where the case concerns a juvenile) (quoting *In re Lucas F.*, 510 A.2d 270, 273 (Md. 1986)); *In re V.P.*, 55 S.W.3d 25, 31 (Tex. Crim. App. 2001) ("In determining whether a minor was in custody at the time of questioning, courts consider the age of the defendant and all the circumstances surrounding the interrogation to decide whether there was a formal arrest or a restraint of movement to the degree associated with formal arrest."); *In re Ojore F.*, 673 N.Y.S.2d 993, 996 (Kings County Fam. Ct. 1998) (holding that "special care must be taken" when determining the custodial status of juvenile suspects).

[9] *See United States* v. *Erving L.*, 147 F.3d 1240 (10th Cir. 1998).

[10] *See, e.g.*, *United States ex rel. Argo* v. *Platt*, 673 F. Supp. 282, 289 & n.12 (N.D. Ill. 1987) (applying 'refined objective approach' considering a child's age and intelligence); *United States* v. *Zahrey*, 963 F. Supp. 1273, 1278 (E.D.N.Y. 1997) (citing *United States* v. *Ruggles*, 70 F.3d 262, 264-65 (2d Cir. 1995)).

the Court of Appeals delivered, was a reasoned opinion considering two interrelated strands of due process law – custodial status and procedural safeguards for children – in light of each other. This Court should not allow state courts to ignore the clear impart of its precedent, not to mention good sense, in making constitutional adjudications. To do otherwise would be to ratify abuse of the habeas process by state courts like the California Court of Appeals. Accordingly, this Court should reject Petitioner's request for reversal, and instead affirm the decision of the Court of Appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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